

(25,193)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 418.

PHILIP NELSON, PLAINTIFF IN ERROR,

vs.

SOUTHERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA.

INDEX.

	Original.	Print
Petition for writ of error and allowance.....	1	1
Assignment of error	3	2
Writ of error	7	4
Citation and service	8	5
Certificate of lodgment	11	6
Bond on writ of error.....	12	6
Transcript of record from the Superior Court of Guilford County	13	7
Summons for relief	13	8
Prosecution bond	14	8
Complaint	14	9
Answer	18	12
Minute docket entries	19a	13
Judgment	19b	14
Defendant's statement of case on appeal.....	20	15
Testimony of Philip Nelson	20	15
Dr. S. W. Maphis	33	24

	Original.	Print
Testimony of Dr. R. S. Spillman	35	25
Dr. H. H. Ogburn	36	26
Marshall Stewart	38	27
R. W. Stump	38	28
S. D. Newton	40	29
C. W. Higgins	44	32
R. M. Middleton	45	33
R. C. Hood	46	33
Z. V. Conyers	46	33
R. L. Justice	46	33
H. J. Thurman	46	33
A. J. Klutz	46	33
Motion for nonsuit	46	34
Testimony of Dr. A. R. Shands	47	34
D. S. Gaulding	53	38
G. E. Wade	56	40
H. D. Peters	59	42
W. R. Staples	61	43
S. B. Ward	62	44
W. E. Halley	64	46
A. B. Hamner	66	47
J. H. Daniel	67	48
T. A. Spencer	68	48
W. T. Dobbins	69	49
Dr. E. R. Michaux	70	50
Motion for nonsuit	72	52
Defendant's requests for instructions	72	52
Judge's charge	75	53
Assignments of errors	85	60
Undertaking on appeal	89	64
Clerk's certificate	90	64
Docket entries	91	65
Opinion, Brown, J.	92	65
Judgment	95	67
Clerk's certificate	96	67

1 In the Supreme Court of North Carolina.

PHILIP NELSON, Plaintiff in Error,

versus

SOUTHERN RAILWAY COMPANY, Defendant in Error.

Petition for Writ of Error.

Comes now Philip Nelson, the above-named plaintiff in error, and says: That on the 24th day of November, 1915, judgment in this suit was rendered by the Supreme Court of North Carolina, which is the highest court in the state in which a decision in the suit could be had, against the plaintiff therein, and thereafter, to-wit, on the 7th day of December, 1915, the remittitur from said court was filed in the Superior Court of Guilford County, North Carolina, directing and adjudging that the judgment of said Superior Court be reversed; whereupon said judgment became final.

In said suit a title, right, privilege and immunity was duly and specially set up and claimed by your petitioner under the Constitution and under a statute of the United States, and the decision of the Supreme Court of North Carolina was against the title, right, privilege and immunity so set up and claimed, all of which will more fully and in more detail appear in the assignments of error filed herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against him in this action, he respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correcting of the errors complained of, and that an order be entered fixing the amount of an appeal bond herein.

March 7, 1916.

A. L. BROOKS,
O. L. SAPP,
S. CLAY WILLIAMS,
C. L. SHUPING,

Attorneys for Plaintiff in Error.

2 STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue upon the execution of a bond by Philip Nelson payable to Southern Railway Company in the sum of Five Hundred Dollars *Dollars*.

This 8th day of March, in the year of our Lord one thousand nine hundred and sixteen.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

STATE OF NORTH CAROLINA:

In the Supreme Court.

PHILIP NELSON, Plaintiff in Error,

vs.

SOUTHERN RAILWAY COMPANY, Defendant in Error.

Assignment of Error.

Prayer for Reversal.

Now comes Philip Nelson, the above named plaintiff in error, and files herewith his petition for a writ of error, and says that there are errors in the record and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

This was a civil action instituted by the said Philip Nelson, plaintiff below and plaintiff in error, against the defendant below and defendant in error, the Southern Railway Company, for an injury which occurred on June 26th, 1914, at Keysville, Va., while engaged in the service of the said Southern Railway Company, defendant in error, as a civil engineer. It is admitted that the defendant in error was at that time engaged in interstate commerce and that plaintiff, a part of whose duty it was to survey and lay out side tracks where ever necessary, was an employee of said Company, likewise engaged in interstate commerce, and that the rights of the parties are controlled by the Federal Employers' Liability Act. Plaintiff at the time of the injury had been directed by his superior to go to Keysville, Virginia on a rush order and make the survey for a side track in the Company's yards at Keysville. While engaged at this work and walking along between the rails of the main line of the said Company's road, within about one hundred yards of the railroad station, he stepped upon a cross tie and on account of its rotten and defective condition, which was unknown to him, and on account of the fact that the track at that place in the yard was not ballasted he was thrown and his foot precipitated down between the ties and his knee badly injured, rendering him unfit for future service as a civil engineer. The grounds of negligence relied on are

First. That the defendant's main line of track at the place of the injury is in the yard of the Company and was used by the employees of the Company at will, and with the knowledge of the company, as a walk way in passing up and down the track in the discharge of their duties to the Company, and that the Company allowed to remain in its track and road bed at this point a cross tie which was rotten and decayed to such an extent as to be dangerous to persons stepping thereon, all of which was unknown to the plain-

tiff in error at the time, but was or could have been known to the said Company by the exercise of reasonable care.

Second. That the Company's track and road bed at this point were defective and in bad condition in that it was not properly ballasted and on account of the lack of ballast an open space remained between the ties so that the tops of the ties were five or six inches above the top of the ballast between them, so that on the breaking of the rotten tie the plaintiff's foot slipped into the open space between the tie and he was thereby injured.

The plaintiff testified that he had marked the stations on the flange of the inside of the rail and that at the time of the injury he was walking down the track between the rails with his note book in hand, checking up the stations; that this was the usual and proper method of doing this work; that he had just passed station twenty-one when he stepped upon a tie which under his weight broke off

5 and his left foot slipped back and down between the ties, with the result that his foot was twisted and his knee cap dislocated and he was thrown forward; that the distance from the top of the ties to the ballast at the point which he was injured was five or six inches; that he did not observe before stepping on the tie that it was rotten.

The said Philip Nelson, plaintiff in the court below, and plaintiff in error in the Supreme Court of the United States, respectfully assigns as errors in the record and proceedings in this cause in the Supreme Court of North Carolina, the following:

First. The Supreme Court of North Carolina erred in holding and deciding that the trial Judge committed error in declining and overruling the motion of the defendant, the Southern Railway Company, made at the close of the plaintiff's testimony, and renewed at the close of all the testimony to dismiss the case as upon non-suit.

Second. The Supreme Court of North Carolina erred in holding and deciding as a matter of law that under the Federal Employers' Liability Act the record presented no evidence tending to show negligence on the part of the defendant sufficient to authorize the trial Judge to submit the question of negligence to the jury.

Third. The Supreme Court of North Carolina erred in signing the judgment which appears in the record as the judgment of that court.

Wherefore, for these, and other manifest errors appearing in the record, the said Philip Nelson, plaintiff in error, prays that the judgment of the Supreme Court of North Carolina herein dated November 24th, 1915, be reversed, set aside and held for naught, and that a judgment be rendered for plaintiff in error granting his rights under the Constitution and statutes of the United States, and
6 the plaintiff in error also prays for a judgment for cost in his favor.

This the 7th day of March, 1916.

A. L. BROOKS,
O. L. SAPP,
S. CLAY WILLIAMS,
C. L. SHUPING,

Attorneys for Philip Nelson, Plaintiff in Error.

Writ of Error.

UNITED STATES OF AMERICA, 88:

The President of the United States to the Honorable Justices of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity in the said state in which a decision could be had in the said suit between Philip Nelson, plaintiff in error, versus Southern Railway Company, defendant in error, wherein was drawn in question the construction of a clause in the Constitution, and a statute of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened to the great damage of the said Philip Nelson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, on the — day of March, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Eastern Dist. of N. C.,
at Raleigh.]

ALEX. L. BLOW,
*Clerk District Court of United States,
Eastern District of North Carolina.*

Allowed.

March 8, 1916.

WALTER CLARK,
*Chief Justice of the Supreme
Court of North Carolina.*

8

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Southern Railway Company,
Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Carolina, wherein Philip Nelson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of North Carolina, this 8 day of March, in the year of our Lord one thousand nine hundred and sixteen.

WALTER CLARK,
*Chief Justice of the Supreme Court
of the State of North Carolina.*

Attest:

J. L. SEAWELL,
*Clerk of the Supreme Court
of the State of North-Carolina.*

9

STATE OF NORTH CAROLINA,
County of Guilford:

We, the undersigned attorneys of record for the defendant in error in the above-entitled cause—Philip Nelson, plaintiff in error, versus Southern Railway Company, defendant in error—hereby acknowledge due service of the above citation, and do hereby enter an appearance for said defendant in error in the Supreme Court of the United States.

This, 10th day of March, 1916.

GARLAND S. FERGUSON, JR.
JOHN N. WILSON,

Attorneys for Southern Railway Company, Defendant in Error.

10

Greensboro, N. C.,

March 10, 1916.

Mr. Jos. L. Seawell, Clerk Supreme Court, Raleigh, N. C.

In re Philip Nelson, Plaintiff in Error, vs. Southern Railway Co.,
Defendant in Error.

DEAR SIR: We have this day accepted service of the citation in the above-entitled cause, and this letter is your authority to attach our

acceptance of service, which is attached to this letter and will be sent to you with the letter by Messrs. Brooks, Sapp & Williams, to the original citation on file in your office.

Yours very truly,

GARLAND S. FERGUSON, JR.
JOHN N. WILSON.

S. C. W. W.

11

Certificate of Lodgment.

STATE OF NORTH CAROLINA, *To wit:*

Supreme Court.

I, Joseph L. Seawell, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk on the 8 day of March, 1916, in the matter of Philip Nelson, plaintiff in error, versus Southern Railway Company, defendant in error:

1. The original bond, of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth, one for the defendant, and one for file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Raleigh, North Carolina, this — day of March, in the year of our Lord, one thousand nine hundred and sixteen.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

12

In the Supreme Court of North Carolina.

PHILIP NELSON, Plaintiff in Error,

versus

SOUTHERN RAILWAY COMPANY, Defendant in Error.

Bond.

Know all men by these presents, That we, Philip Nelson, as principal, and the Aetna Accident and Liability Company of Hartford, Connecticut, as surety, are held and securely bound unto the above-named Southern Railway Company in the sum of Five Hundred Dollars, to be paid to it, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed with our seals, and dated the 7th day of March, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas, The above-named Philip Nelson, plaintiff in error, seeks

to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of North Carolina;

Now, therefore, The condition of this obligation is such that if the above-named plaintiff in error shall prosecute his said error to effect, and answer all costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

PHILIP NELSON, [SEAL.]

By S. CLAY WILLIAMS,
Of Brooks, Sapp & Williams,
Counsel for Plaintiff in Error.

[Seal The Ætna Accident and Liability Company, Hartford, Conn.]

THE ÆTNA ACCIDENT AND
LIABILITY COMPANY,

By A. L. BROOKS,
Resident Vice President,
By FRED C. ODELL,
Resident Ass't Sec'ty.

This bond approved.

This 8 day of March, A. D. 1916.

WALTER CLARK,
Chief Justice of the Supreme Court
of the State of North Carolina.

13

No. 363.

PHILIP NELSON

against

SOUTHERN RAILWAY COMPANY.

From Guilford.

Defendant Appealed.

Before Lyon, J.

Be it remembered, that summons *were* sued out of the Superior Court of Guilford County, North Carolina, on the 2d day of December, 1914, by Philip Nelson in the following words and figures, to wit:

Summons for Relief.

STATE OF NORTH CAROLINA,
Guilford County:

In the Superior Court.

PHILIP NELSON

against

SOUTHERN RAILWAY COMPANY, INC.

State of North Carolina to the Sheriff of Guilford County, Greeting:

You are hereby commanded to summon Southern Railway Company, Inc., the defendant above named, if it be found within your county, to be and appear before the judge of our Superior Court to be held for the county of Guilford, at the courthouse in Greensboro, on the 14th day of December, 1914, and answer the complaint, which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of the term; and let the said defendant take notice, that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint and the cost of this action, to be taxed by the clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court, this 2d day of December, 1914.

M. W. GANT,

Clerk Superior Court Guilford County.

14

Prosecution Bond.

We acknowledge ourselves bound unto Southern Railway Company, Inc., the defendant in this action, in the sum of two hundred dollars; to be void, however, if the plaintiff shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 2d day of December, 1914.

PHILIP NELSON.

[SEAL.]

THE AETNA ACCIDENT & LIABILITY CO.

F. P. HOBGOOD, *Res. V.-President.*

[CORPORATE SEAL.]

FRED C. ODELL, *Res. As't Secretary.*

Sheriff's Return.

Returnable to December 14, 1914, term of the Superior Court of Guilford County.

Received December 4, 1914.

Served December 4, 1914, by reading the within to and leaving a copy with J. E. Webb, chief clerk of So. R. R. Co.

D. B. STAFFORD, *Sheriff*,

By J. S. PHIPPS, *D. S.*

Complaint.

NORTH CAROLINA,
Guilford County:

In the Superior Court.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

The plaintiff, complaining of the defendant, alleges:

I. That the plaintiff is a citizen and resident of Guilford County, State of North Carolina, and was such at the time of the commencement of this action.

II. That the defendant, Southern Railway Company, is, and was at the time of the injury hereinafter complained of, a corporation duly chartered and organized under the laws of the State of Virginia, and as such was a common carrier of both freight and passengers for hire and engaged in the business of interstate commerce, and as such maintained lines of railway, including tracks, sidetracks, cars and other equipment in the States of Virginia, North Carolina, and other States, and particularly a line of railway leading from Richmond, Virginia, by way of Keysville, Virginia, to Danville, Virginia, and to Greensboro, North Carolina, and other points south, and over which line the defendant was engaged at and before the time hereinafter complained of in interstate commerce as a common carrier of both passengers and freight, as aforesaid.

15 III. That on the 26th day of June, 1914, and for some time prior thereto, the plaintiff, Philip Nelson, was employed by the defendant, Southern Railway Company, as a civil engineer, and as such it was his duty to make surveys and locate tracks and sidetracks for the defendant along its said line of road, which said tracks and sidetracks were used by the defendant as a part of its system in the carrying of its interstate business, as aforesaid.

IV. That shortly prior to the 26th day of June, 1914, the plaintiff was ordered and directed by the defendant to go to Keysville, Virginia, a station on defendant's main line, running between Richmond, Virginia, and Greensboro, North Carolina, and to make

surveys for new sidetracks and siding extensions in the defendant's yards at Keysville, Virginia, and pursuant to the orders and directions received by the plaintiff from the defendant in regard thereto the plaintiff, on the 26th day of June, 1914, was at Keysville engaged in making surveys and in locating the new sidings and siding extensions for the defendant, the said sidetracks and siding extensions to be connected with and a part of the main line, and for use by the defendant in its business of interstate commerce, as aforesaid.

V. That in order to properly perform the work of surveying and locating the sidetracks and siding extensions aforesaid, it was necessary, as the defendant well knew, for plaintiff to work upon, along and over the defendant's main line of railway aforesaid, and on said day and date plaintiff was working upon, along and over defendant's said line of railway in its yard near the station house, and in the

16 furtherance of this work had marked certain stations on both rails of defendant's main line of railway aforesaid, which said marked stations were necessary to carry on the work at which plaintiff was engaged. Following this, plaintiff began walking along and between the rails of defendant's main line track, checking over the marked stations, as aforesaid, all of which was necessary for plaintiff to do in order to properly perform the work which he had been directed to do. That while so walking down the track between the rails, one of defendant's crossties upon which plaintiff stepped instantly broke and gave way under the weight of his step, thereby causing his foot to suddenly and violently slip down between this broken tie and the adjacent tie, causing great injury to the plaintiff, as hereinafter set out. That the said crosstie was rotten and decayed in such a manner as to be dangerous to a person stepping thereon, all of which was unknown to this plaintiff at the time, but was, or could have been, known to the defendant by the exercise of reasonable care. That defendant's track and roadbed at this point was further defective and in bad condition as the defendant knew, in that it was not properly ballasted, leaving an open space between the ties, so that the top of the crossties were five or six inches above the top of the ballast between the ties, and when the rotten tie broke with plaintiff, there being no proper ballast raising the surface between the ties, his foot fell to the bottom of the unfilled space between them some five or six inches, inflicting serious and permanent injury.

VI. That the defendant's main line of track at this place is in the yards of the company and is used by the employees of the company at will as a walkway in passing up and down the track in the discharge of their duties to the defendant company, all of which was well known to the defendant. That plaintiff is advised and believes and alleges that it was the duty of the defendant to keep and maintain its track and line of railway at the point aforesaid in a reasonably fit and safe condition for plaintiff and other employees of the company who used same, to pass along and over it on
17 foot, so as to enable him to perform the work at which he was engaged without unnecessary danger, and plaintiff alleges that defendant was guilty of negligence in permitting

said track at the point where plaintiff was injured to become in the condition hereinbefore described, and in allowing said track to remain in such unsafe condition; that defendant was guilty of negligence in allowing the cross-ties aforesaid to remain as a part of its line of railway in the unsafe, decayed and rotten condition in which it was at the time plaintiff stepped thereon, and defendant was guilty of negligence in not removing said cross-tie from its line of railway aforesaid, and in not replacing the same with another cross-tie reasonably sound and safe; that defendant was guilty of negligence in permitting its track to be ballasted in such a way that the top of the cross-tie aforesaid was five or six inches above the top of the ballast, and in allowing said track to remain in such condition in regard to ballast, and in not ballasting its track in such a way as to bring the ballast up to or near the top of the cross-ties aforesaid, and in permitting the ties and space between them to become and remain in an unsafe and dangerous condition for its employees to walk on and over in the discharge of their duties to the defendant.

VII. That because of the negligence on the part of the defendant as aforesaid, plaintiff's foot was thrown, by the breaking and crumbling of the cross-tie aforesaid, into the space between this cross-tie and the one adjacent thereto, which space existed because of the carelessness and negligence on the part of the defendant as to the manner in which said line of railway was ballasted, as aforesaid, and the ligaments and cartilage in plaintiff's knee *was* broken and injured, and plaintiff was thereby severely, seriously and, as he is informed and believes and alleges, permanently injured in his left knee; that said knee was rendered stiff, and plaintiff was lamed and made sick, and thereby caused to suffer severe physical and mental pain and anguish, and continues so to suffer, and has lost the use of his left knee, and is incapacitated for work, that he was compelled to have his knee enclosed in adhesive plaster, and has
18 continually since that time been compelled to keep his knee enclosed and braced with plaster, and plaintiff was compelled to expend — dollars for the services of physicians and nurses, and continues to be compelled to undergo expenses for medical treatment and for nursing, all greatly to plaintiff's damage, as hereinafter alleged. That plaintiff by profession is a civil engineer, and in this occupation he is required to do much walking and standing on his feet, that as a result of the above named injuries caused by defendant's negligence he has been, as he is advised and believes, maimed for life and forever rendered incapacitated to do active work as an engineer.

VIII. That the negligence of the defendant aforesaid was the proximate cause of the injury to plaintiff, and inflicted while he was engaged at work for the defendant in interstate commerce, as herein fully set forth, and for his protection plaintiff invokes the Federal statutes in such cases made and provided.

IX. That because of the negligence aforesaid on the part of the defendant, causing the injury and suffering to plaintiff, as hereinbefore set out, plaintiff has been damaged by the defendant in the sum of twenty-five thousand dollars.

Wherefore, plaintiff prays for judgment against the defendant in the sum of twenty-five thousand dollars, and for his cost of this action, to be taxed by the clerk, and for such other and further relief as he may be entitled to.

BROOKS, SAPP & WILLIAMS,
Attorneys for Plaintiff.

Answer.

NORTH CAROLINA,
Guildford County:

In the Superior Court, April Term, 1915.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

The defendant, answering plaintiff's complaint, says:

- I. The allegations of the first article are admitted.
- II. The allegations of the second article are admitted.
- III. The allegations of the third article are admitted.
- IV. The allegations of the fourth article are admitted.
- 19 V. The allegations of the fifth article of the complaint are not true, and are denied, and the defendant avers that the facts in regard to the plaintiff's injury are as hereinafter stated in this answer by way of further defense.
- VI. The allegations of the sixth article of the complaint are denied.
- VII. The allegations of the seventh article of the complaint are denied, except that it is admitted that the plaintiff received a slight injury to his knee, and the defendant avers that said injury was caused without fault or negligence on its part, but wholly on account of the negligence of the plaintiff as hereinafter more fully set forth; and all allegations of said article not herein admitted are denied.
- VIII. The allegations of the eighth article of the complaint are denied.
- IX. The allegations of the ninth article of the complaint are denied.

And for a further defense the defendant says:

(1) That the plaintiff, on the 26th day of June, 1914, while walking along the track of the defendant at Keysville, Virginia, through no fault or negligence on the part of the defendant, negligently and without the exercise of due care and caution on his part, slipped or stumbled upon the crossties and wrenched or sprained his knee, and the negligence of the plaintiff contributed to and was the proximate cause of his injury.

(2) That there was a safe way in which the plaintiff could walk alongside the track and outside and beyond the rails and the ends of the crossties, and the plaintiff voluntarily chose to walk upon the crossties and track, and if the track was in a defective condition as

alleged in the complaint, which is denied, then this was known to the plaintiff, and when he voluntarily chose to walk upon the cross-ties and track instead of walking alongside the track, he was guilty of contributory negligence which was the proximate cause of his injury.

(3) That the plaintiff being a civil engineer in the employment of the defendant assumed the dangers and risks normally and necessarily incident to his occupation, and among such risks in walking along and over the track of the defendant while engaged in his duties — a civil engineer he assumed the risk and danger of stepping upon cross-ties that were wholly or partially defective and slipping and falling on account of such defective cross-ties, and if the plaintiff, while engaged in such duty, stepped upon a defective cross-tie in the track of the railway company, this was a risk assumed by him and he is, therefore, not entitled to recover, and the defendant pleads such assumption of risk as a defense to this action.

Wherefore, the defendant having fully answered, prays the judgment of the Court that the plaintiff take nothing by his action and that the defendant go hence without day and recover of the plaintiff and the surety on his bond the costs of this action, to be taxed by the clerk.

— — —
Attorneys for Defendant.

C. A. Pamplin, being duly sworn, says that he is agent of the Southern Railway Company at Greensboro, N. C., and that he has read the foregoing answer, and that the same is true of his own knowledge, except those matters therein stated on information and belief, and as to those he believes it to be true.

C. A. PAMPLIN.

Sworn to and subscribed before me, this the 12th day of April, 1915.

ANDREW JOYNER, JR.,
Deputy C. S. C.

Minute Docket Entries.

Wednesday Morning, April the 21st, 1915.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

In this case the following jury was sworn and impaneled, to wit, E. Crisco, B. L. Coley, H. H. Brown, H. H. Slaton, J. W. Lindley, G. H. Buchanan, C. A. Shoffner, M. W. Lewis, H. W. Wharton, W. C. England, W. H. Stone, — Cole, who, in answer to the issues submitted to them return the following: (As set out in the judgment.)

Motion to set aside verdict as being against the weight of evidence;

motion overruled; defendant excepts. Defendant moves for new trial for errors committed during trial; motion overruled; defendant excepts. Judgment. Defendant excepts; defendant appeals to Supreme Court. Notice given in open court. Appeal bond fixed at fifty dollars. By consent, defendant is allowed sixty days to prepare and serve case on appeal, and plaintiff sixty days thereafter to prepare and serve counter case.

Judgment.

NORTH CAROLINA,
Guilford County:

In the Superior Court, April Term, 1915.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

His Honor C. C. Lyon, Judge, Presiding.

This cause coming on to be heard, and a jury being called, sworn and impaneled, who for their verdict answered the issues submitted to them as follows, to wit:

1st. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer: "Yes."

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

Answer: "No."

3rd. Did the plaintiff assume the dangers and risks, as alleged in the answer?

Answer: "No."

4th. What damages, if any, is plaintiff entitled to recover?

Answer: "(\$6,509.00) six thousand five hundred and no-100 dollars."

Now, therefore, upon motion, it is ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of six thousand five hundred dollars (\$6,500.00) with interest from date, together with his cost of this action, to be taxed by the clerk.

C. C. LYON,
Judge Presiding.

Defendant's Statement of Case on Appeal to the Supreme Court.

NORTH CAROLINA,
Guilford County:

In the Superior Court.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

This was a civil action tried at the April term of Guilford Superior Court, 1915, before Hon. C. C. Lyon, judge, and a jury, and was to recover damages for injuries alleged to have been received by the plaintiff at Keysville, Virginia, while in the employ of the defendant company as a civil engineer, and engaged in surveying for the construction of a sidetrack near said station.

The plaintiff introduced the following testimony:

PHILIP NELSON, the plaintiff, testified as follows:

Direct examination:

I am thirty-six years old; am a civil engineer; live in Greensboro; I was in the employ of the Southern Railway Company, the defendant, during the year 1914; had been in their employ about eleven years. I was assistant engineer on the Northern District; the Northern District embraces five divisions—the Danville, the Washington, the Winston-Salem, the Richmond, and Norfolk Division. I was directed to go to Keysville to do certain surveying. I worked from the Richmond office. Mr. S. D. Newton was office engineer at that time. Mr. R. L. Sitton had been appointed resident engineer. I was reporting directly to Mr. Newton. I had been sent to Keysville, I think, on the 25th, the day before I went there. I received instructions to go to Keysville and make some surveys for sidings that would be needed, which would be pointed out to me by the superintendent,

21 Mr. Hudspeth, of the Richmond Division, and I was instructed to finish that work that day and get the map and estimate out the next day, as it was necessary to have this at once. I went to Keysville the next day on No. 5 and Mr. Hudspeth met me there and showed me what he wanted. When he finished showing me the additional tracks he wanted it was about 11 o'clock and then I was to make the rest of the survey between that time and night, and it embraced about 6,800 feet of track, and I don't know whether there were four or five additional tracks or not, but there was something like that. I had a section hand and Fred Dobbins, who was the son of the engineer of maintenance of way, to help me. The first thing I did was to put in stations, that is to measure distances on the track over one hundred feet and mark them with chalk; these stations are one hundred feet lengths on the chain and you mark

them so you can see them plainly to come back to them, and then get your location of different buildings or switch points and frogs and take cross-sections from those points, and I did this, put in these stations, using some of the physical valuation stations. They were marked every one hundred feet, and I used them to facilitate my work because it helped me to get along with the work. The Southern Railway Company is making a physical valuation of all their track-age now. They put in station just like I would do in making a survey, and located all the structures from these stations. These stations were marked on the east side of the track, east rail of the track on the inside, and at frequent intervals it was impossible to find these stations on account of the ballast being over the flange of the rail, and in those instances, inasmuch as my survey was on the west side of the track, I transferred the stations over and put them on the west rail of the track. The physical valuation stations that I found already in were remarked, and my recollection is that about station eighteen we could not find any more physical valuation stations at all and put all the stations in on the west rail. I indicated them on the rail by mark on the flange with this chalk and a number. That was

22 on the inside of the rail, and then we made the location after putting in all the stations, and I think took some levels, and after that I was walking back checking over my stations, seeing that they were numbered consecutively. I should have stated before that it is usual in locating these stations for the rodman to call out the stations at which he is, and the front chainman to call out the station at which he is. This was done on this occasion. It is customary as an engineer engaged in work which I was engaged, and is usual and necessary in that character of work for the engineer to walk between the rails of the track where he is marking the stations on the rail. I had my book that I was checking from in my left hand. I had just passed station 21 when I stepped upon a tie which broke off with my weight upon it, and my foot slipped back and down between the ties and twisted it in that direction (indicating), and dislocated my knee cap, and I fell towards the right, stumbled that way. I did not fall all the way down. My recollection is I caught on this foot and possibly with this hand (indicating). There was about five or six inches from the top of the tie to the bottom of the ballast in there at that particular point. I did not observe before I stepped on the tie that it was in a rotten, defective condition; it was an oak tie. An oak tie of that character rots from the inside. It can be determined, and the Southern Railway Company prior to this time did determine the question of whether or not an oak tie was decayed by sounding it, knocking on it, taking an iron bar and knocking on it, or if it rots in the end you can look at the end and see it is rotten from the heart out. I looked at this tie after it broke with me. This tie was in the condition that if it had been sounded as indicated by me it could have been discovered whether or not it was rotten. The tie was in the yard of the Southern Railway at Keyesville. I can not say whether that line of track in the yard at that point was used as a walkway or not, it was in the yard, but I can not say that I saw the employees walking along there; it was there near

the station, about 350 feet from the station. I examined the tie when it broke with me. The tie measured six inches on the west end and nine inches on the east end; in the center of the track it has a face of three and one-half inches from the center. I did not make the measurements at the time; I made the measurements three or four months afterwards. It measures three and one-half inches beginning six inches from the west rail to the center of the track and then goes out to nine inches at the end of the tie. That is the face of the tie. The balance of the face had rotted away. The portion of the face is about two inches wide and I should say went from one and one-half inches in depth to nothing; it was in a "V" shape, and was about five or six or seven inches long. I did not measure that. I didn't go anywhere for a few minutes; the pain in my knee was so great that I rubbed that for awhile, and then I finished my survey that afternoon. There was not a great deal more to be done; I think I worked about two hours more and then went back to Richmond that night. I was rooming in Richmond with Mr. Robert W. Stump; he was practicing law; I have him here as a witness. I stated to him that night how the accident had occurred and showed him my knee, showed him the condition of it. The knee was very badly swollen and very painful. I saw Mr. S. D. Newton, the supervising engineer of the station, under whom I was working, the next day, saw him in the office. I told him about my injury and how I had been hurt. Have him here as a witness. I thereafter consulted a physician or surgeon of the Southern Railway Company. In about two weeks the knee was in such condition and was giving me so much trouble that I began to be uneasy about it, and I wired Mr. M. H. Dooley, general claim agent of the Southern Railway Company, and I think stated the circumstances surrounding my injury, and asked him if I could come to Washington to see Dr. Shands, and he wired me to come, so I went to see Dr. Shands in Washington immediately. Dr. Shands is a bone specialist of Washington and does all the Southern Railway Company's special work. He gave my knee an examination, I think preliminary, and he stated to me that I had a broken ligament in my knee and that he would bind it up in adhesive plaster, which he did, and instructed me not to bend my knee, and if I did bend it to bend it only very little. I then said to him, "How about my work, can I do that?" He said, "Yes, I think you can do your work all right." I said, "Do you know, doctor, what I have to do?" And he said, "No, I do not," and then I explained to him what work I had to do in connection with the job as assistant engineer, and I told him I think I can arrange to get my summer vacation. I was afterwards discharged by the Southern Railway Company while I was laid off with my knee. They did not pay for the time I had already worked. I then went to see Dr. Harrison, here in Greensboro. I went back to Norfolk and went to see Dr. Spillman, of Norfolk, Va., about the latter part of August. He is a practicing physician in Norfolk and he is also my wife's aunt's family physician, and also the family physician of my brother in law. I also went to see Dr. Maphis, of Warrenton, Va. That is my old home. The knee gave me a good deal

of pain from time to time; the pain is not continuous except in bad weather, and then it aches all the time. There is a tendency of the cap to slip out of place all the time; unless I had it held there with bandages it would slip out of place. It will do that now. I am lame and am not able to pursue my profession at all. The Southern Railway Company was paying me \$1,500 a year and my expenses when on the road. I do not think that I can explain exactly what effect it had on my nervous condition. I am not as robust as I was before and have not the same health I had before. As an instance, I fell off eleven pounds in five days' time, I think, three weeks ago. I do not sleep well at all. The date of this occurrence was June 25, 1914.

Cross-examination :

My home is in Warrenton, Virginia; that is where I was raised. I came to Greensboro and entered the service of the Southern Railway Company here under Mr. Southgate; Mr. Southgate was succeeded by Mr. Thos. Bernard. The majority of my service has been under Mr. Bernard. I was not living in Greensboro at the time the accident occurred; I had been transferred to Richmond in 25 May and this occurred in June. My headquarters had been transferred to Richmond. At the time I was injured, Mr. Sitton was resident engineer and Mr. S. D. Newton had charge of the office. I never saw Mr. Sitton but once in my life. What his duties were I do not know. I went out to Richmond to do that work. I started out in the service of the road as a rodman, and I think I was eighteen months as a rodman, and I was then put in charge of a new yard to be built at Greenville, S. C., and I stayed there and superintended the construction of that yard until there was a vacancy created among the engineers in the office at Greensboro, and Mr. Bernard promoted me to the position of assistant engineer. That was about two years or possibly two and a half years after I had first taken service with the railroad company, and after that I had about nine years' experience, eleven years' experience, I should say, altogether as a railroad engineer. As a part of that experience I had to supervise the construction work, to a great extent I was thoroughly familiar with the construction work; I was thoroughly familiar with all the work of an engineer and all the method- and manner of laying tracks and sidetracks. In that work I very often had to lay out tracks over very rough territory; I had to lay out work over territory that was in rocks and gulleys and hills and over the streams and even through mountains. As a part and parcel of my work as an engineer I had to be particular as to where I was going and where I stepped on in the construction work. I don't know how many times I went over this particular part of the track in the territory where I was fixing the sidetracks, possibly twice or three times, possibly four times, I really can't say. I don't think I went over it four times that day, I don't think it was the fourth time I had gone over the track when I was hurt. I think it was the third time. I could not say exactly whether I went along the outside or the center of the track the other two times, but the impression

is I was on the outside of the track. I don't know whether I went on the inside or not. Those other times I was locating the structures, the various structures around the depots, water tanks, switches, frogs, mileposts, and that sort of thing, and taking levels of the track, as I recollect it. In taking levels I did not have to observe the track; I marked the stations the first thing I did when I got there; the first thing I did was to go along that track and mark the stations. In marking the stations I had to go along the track and went inside the rails when marking the stations. I went along exactly the same way in marking the stations in the first work that I did in checking up when I was injured. In taking the levels the second time I think I went on the outside of the rails; I am not absolutely certain about it; but it is not usual for me to set up my instrument in the center of the track. I can not say that I have any positive recollection about it. I was on the north side of the depot when I was hurt, between the depot and the tank. I was about three hundred and fifty feet from the depot, on the main line. I was fixing to put in a siding which would connect with the main line near the tank and go around the depot and connect on the south side of the depot with the main line on that side—a double-end siding. I was injured near station 21. My stations started 440 feet, I think, north of the north switch; that is, that would have been zero point; this was about 1,700 feet south of the north switch, 350 feet from the depot building. I have been there lately. I saw the tie that I spoke of day before yesterday. Mr. A. A. Williams was with me. I pointed it out to him at the time. The tie I am speaking of is still in that track, has not been removed, and is north of the depot building, between the depot and the tank. I am certain of this. A tie does not begin to decay from the outside, not so far as my experience goes. I say that the portion of the tie next to the bark does not begin to decay exposed to the weather before the heart does; I will say that relative to oak timber. The way that you can ascertain whether oak timber is decayed is sounding the heart, if there is any heart there; I suppose you sound the heart. There is no heart there if it is rotten away, but originally there is a heart to all oak hewn ties. This was a hewn tie. It is my opinion that a piece of oak timber exposed to the weather will rot from the heart out and not from the sap part in, that is what I have learned from observation. Notwithstanding that opinion and the long observation that I have had, I say that in stepping upon this tie it broke from the outside where I stepped upon it, a piece one and one-half inches in depth running out to nothing, and about six inches long, "V" shape; I did not take the particular pains to look out and measure the piece that had been broken off; I stepped to see it, I came back to look at it, I did not measure it. I came back to look at it immediately as soon as I stopped rubbing my knee; as soon as the pain had disappeared to a certain extent I came back and picked up my station to go on with my work. I did not go back especially to see the piece, though that may have been one of the motives of my going back; I can't say about that. I pointed this out to Mr. W. W. Roberts. I don't know the exact date, it has been some time ago, though. I

don't know whether he is here or not, I have not seen him. I had him subpoenaed. The tie that I showed to Mr. Roberts is the one that I got hurt on. It is not a perfectly sound tie, a small tie with a rounding surface on the top. The surface is perfectly flat on top, one end of it is rotted. The center of it is only three and one-half inches surface and the other end is nine inches in width. I can tell you some more about it; the tie as it stands now shows where a piece has come off from the top about the width, the length and depth I described and shows a rotten bearing under that still where it came from. At that point there was a place five or six inches deep where the ballast did not come up between the ties. It is not there now, it has been filled in; that is only about two inches from the top of the tie to the top of the ballast. The condition is not now what it was at the time that I was making the survey. Could not say that there had been any other work upon the track except the filling in with the ballast and cinders. I don't know what the condition of the rest of the track was the other day, I did not take particular note of it. I went over the track three or four times the day I was injured, but not to examine the track; that was not my duty. It was not a part of my duty, wherever I discovered the track in bad condition, which needed to be called to the attention of the proper authorities, to report that; I could have volunteered and would have volunteered to do it. If I saw the track in such condition that I thought it would be defective to operate over I would certainly have reported it. This track was not in a dangerous condition for the purpose of operation; this particular part of the track was not in a dangerous condition as to operation, so far as I observed. The tie I saw and the condition of the track there as I observed it was not dangerous to the operation of trains; one tie would not have any effect at all. You could leave out a tie and it would probably not interfere with operation at all. I do not know that one rotten crosstie would affect the operation of a train, I should not think so. I can not recall any special road I have observed as to rotten ties outside of the Southern, but I have observed quite a number of rotten crossties on the Southern. I think it is perfectly true that is a universal condition that there are some decayed ties but not enough to affect the operation in anyway of the roads, but this is not so far as my own observation goes, I can not say. With respect to ballast, I expect there are places over all roads between ties that are not entirely filled in with the ballast; I don't know this. If the crossties on either side are sound, the condition of one crosstie whether defective or absent, will not affect dangerously in any way the operation of the road. The failure to fill up entirely with ballast between any two ties will not impair the use or safety of the track in operation. The condition of this tie was such that it can not be easily observed by you in passing and repassing there. I could not by ordinary observation see the condition of this tie; I know this because I have tried it since, and because the defect in the tie was on the inside and because I did not know that this piece was ready to rot off. Unless I had stopped to make a close inspection of the tie I could not see that this defect was there. I was injured about 3 or 3:30 in the after-

noon. The stations which I spoke awhile ago of marking were marked on the flange of the rail, inside. I did the marking.

29 I went ahead. We made our measurements there in order to get the stations, with a 100-foot steel tape; I would make a mark on the top of the rail and then I marked on the flange of the rail, numbered the station and called out the number at which I was, and he would come up and put his end of the tape on this mark I had made on the rail, call out his number, and I would call out the next one where I was at that time, and consecutively straight on through. I did that walking between the rails. The same day I would go back and check over to see that my stations were right, and if I found any mistakes I went over it and corrected those mistakes or corrected them in my notebook. On this particular occasion I corrected it in my notebook. We usually checked over as a rule. I did not perform any work that day in checking over that we do not usually perform. I think it is usual to check the stations. When I was injured my knee cap came out of place. The first time my knee ever slipped out of place was playing football years ago at the Episcopal High School when I was a boy, the same leg that was injured. I was about twelve years old at that time. My knee cap did not from time to time slip out of place, it slipped out at Reedy Fork wreck. Yes, I did have trouble with that knee between the time that I was hurt playing football and the Reedy Fork wreck; that was once I fell off of a bicycle, the knee slipped out of place; that was in 1896, I think. The next time was at Reedy Fork. It slipped out twice altogether, I mean before Reedy Fork—once playing football and once when I fell off a bicycle. That had very little effect upon my knee or my locomotion. I can not say how much; I was lame for a short time, would say a week or so. It didn't affect my walking after that. I was hurt at the Reedy Fork wreck, December 15, 1909. I can not say how badly I was hurt.

Q. What particular part of your body was hurt?

A. I was hurt all over?

Q. How about that knee?

A. That knee was injured, also.

Q. You claimed at that time that the same knee was permanently injured?

A. I never did in my life.

30 Q. Didn't you settle for a permanent injury of your knee at that time?

A. I most positively did not.

Q. How badly was your knee injured at that time?

A. My knee was injured to the extent of putting me on crutches for about four or five months, three or four months. I then went at Mr. Dooley's solicitation—he is the chief law agent of the Southern Railway Company—I went to see the Southern Railway Company specialist at Washington.

Q. Who is that?

A. Dr. A. R. Shands. Dr. Shands treated my knee. He put me under ether and operated on me. There were adhesions, he said, and I think he was correct, and he broke up those adhesions, and he

then subjected me to a course of massaging and baking. My knee was put in an oven every day and subjected to a temperature of about 135 or 140 degrees and it was then massaged, and Dr. Shands himself assured me——

(Defendant objects; sustained.)

A. I did not settle upon the basis of a permanent injury at all.
Q. What were you paid for your injury at Reedy Fork wreck?

(Plaintiff objects; overruled; plaintiff excepts.)

A. I was promised a job——

(Defendant objects; overruled; defendant excepts.)

A. The consideration for the injury, I was promised a job as long as I wanted it and I was paid \$2,500 in cash. Mr. Dooley told me I would never have to worry about a job again.

Mr. Brooks:

Q. Who is Mr. Dooley?

A. Mr. Dooley is the chief law agent.

(Defendant objects to that portion of the answer in regard to any promise made the plaintiff. The Court rules that that portion of the answer as to any statement made by Mr. Dooley be stricken from the record.)

Mr. Wilson:

Q. During the time you were laying off from your injury, you were also paid your salary?

A. Yes.

Q. In addition to the \$2,500?

A. Yes, they started paying my salary three month- after I got hurt. Up to three months they did not pay me my salary.

31 The injury in my boyhood, the injury when I fell off the bicycle, the injury at Reedy Fork, and this injury that I am suing for, was all the same injury and the same leg. After the injury at Reedy Fork my knee cap did not slip in walking; I had no trouble with my knee cap at all. My knee cap was so badly affected that it adhered to the large bone of the knee and had to be broken loose after the Reedy Fork accident. I understood your last question to ask me if it had slipped in walking; I told you "No." The knee cap was knocked or slipped from my knee at the time of the injury. It is adhering to the big bone in healing up and having to be broken loose was not the result of the injury at all, that was the result of the fact that it was bound perfectly stiff, made rigid in a plaster paris cast, the knee being in that position for so long it had simply grown to the leg and grown to it up here, and of course became stiff. When those adhesions were broken up I had perfectly free movement of the knee. That is all that was the matter as far as I know; that is all Dr. Shands ever told me was the matter.

Dr. Harrison treated me for the Reedy Fork accident; he gave me first-aid treatment for a week.

Redirect examination:

Q. You stated to Mr. Wilson that in this Reedy Fork accident, which I think occurred about five years ago——

A. Six years ago, I think.

Q. That you were hurt all over, as you express it. What did the Southern Railway Company do to you at Reedy Fork?

A. They were running along on the main line going at sixty miles an hour; just before taking the curve at the trestle the rail broke under the weight of the engine and the car I was in and several other cars flew off the trestle and flew through the air and landed in the river fortunately.

Q. What occurred to you?

A. The car turned in the air. I was in bed and was thrown across on the other side of the car, which landed in the river. I was thrown under the water and pinned down on my back, and I had this sensation of drowning, and my first thought was that I was going to drown; but I managed to wiggle from under the seat pinning me down and stood up, and I stayed in the water for two and one-half hours, stood there in the cold water, and finally the relief train came and they took me out of the car and put me under the trestle, or wherever it was they had a fire.

Q. As a result of the injuries received there in this occurrence you settled with the Southern Railway Company for \$2,500?

A. That was one of the considerations.

Q. Please state to his Honor and the jury the entire consideration of that settlement.

A. There was a verbal promise from Mr. Dooley that I would never have to worry about a job as long as I lived after that, and the consideration of \$2,500 in addition to that.

(To all the foregoing questions and answers set out, the defendant, in apt time, objected; objection overruled, and the defendant excepts.)

First exception.

After the Reedy Fork wreck I went back in the employ of the Southern Railway Company, I went back doing inspection work at first, and this job was created I think especially for me, and I inspected several buildings, the construction of several building at Spencer, Thomasville, and others, and then I came back to this office and was promoted, my salary was raised, and I came back to this office and continued to do the duties of assistant engineer, under Mr. Bernard. After the wreck I worked for the Southern from September, 1910, under Mr. Bernard until he was made assistant to the chief engineer; I think that was in 1913 some time, about three years. During that time I had other gentlemen who worked with me, these gentlemen were Mr. A. A. Williams, C. W. Higgins and W. B. Bandy. After the injury I was under the charge of Dr. Shands. I

left his jurisdiction before I went back to work in 1910. I was practically well when I went back to work; I can not say that I was thoroughly well at the time. My knee became thoroughly strong so far as I know. It was about three and one-half years from
33 that time up to this injury. At the time of the injury I was doing general roadway work, which embraces walking a good deal, sometimes ten and twelve miles a day, and climbing up and down high cuts and fills, fifteen, twenty, twenty-five or thirty feet high, and taking cross section. I was going over the rough country Mr. Wilson was talking about. I know the standard tie of the Southern Railway; it is seven inches by nine inches by eight and one-half feet; nine inches face, seven inches depth, and eight and one-half feet long. I took a man by the name of Roberts down there to look at the tie; I had him subpoenaed. I sent him the money to come here as a witness; he lives in Virginia. I do not know why he is not here; I can not say. Since the accident ballast has been put between the ties and raised up to about two inches of the top of the tie.

Dr. S. W. MAPHIS, witness for plaintiff, testified as follows:

Direct examination:

I live at Warrenton, Virginia; am a practicing physician; was educated at the University of Virginia and University of Maryland. Been practicing since 1893. Have had hospital and surgical experience in general practice; my first five years I was surgeon of the Chicago drainage canal; since then I have been doing general work.

(It is admitted that the witness is a medical expert.)

I have known Mr. Nelson about twelve or thirteen years; his father was rector at Warrenton and I knew the family very well. I have known him and seen him at different times for that length of time. His general character is good. Mr. Nelson came to me and asked me to examine his knee; my recollection is that it was about the middle of September when he came to my office; he had been to several physicians prior to that, and I think had come from Norfolk is my recollection. He applied to me at my office about the middle of September, as well as I recollect, and he had some strapping on the knee, and the edges of the adhesion were getting loose and a little splint to hold the knee cap over, had been applied by another physician. I do not know just when this was applied.

34 I removed these adhesions from his knee and made an examination and put the knee up into new adhesive strips for him and made an examination, I think two examinations, after that I adjusted the adhesives, and that was between the 15th of September and about the first of November. He left there about the first of November, I think, and during that time I saw him about three times. When I saw him the knee cap was pushed to the side of his leg, and my opinion then was that the ligaments were torn and there was a thickening of some of the cartilage which I thought

was due to injury of the cartilage on his knee joint. The knee cap was slipped over considerably. I do not recall the details that he told me, but generally he told me that it was hurt while at work at his engineering work by falling on a rotten tie. I have not seen his knee since I have been here. From the examination I made of his knee and the condition it was in, I think the injury is a permanent one. To any person who would have to do much walking it is absolutely, in my opinion, a permanent injury, because it has injured the joint. From the disuse of the knee there would be a certain atrophy of certain muscles if he would not call those muscles into play; of course if you got the use of the knee they would return and the probability is there would be pain. There was a slight atrophy; if he did not use certain muscles there would be an increase in the atrophy; in the condition I found him I think the tendency is to increase the atrophy.

Cross-examination:

Mr. Nelson did not tell me about being hurt when he was playing football as a boy; he did not tell me about falling off of a bicycle and the injury to the knee. He told me of a former railroad accident, that he had had some settlement with the railroad, and I recognize it now as the Reedy Fork accident. I do not know how much of the injury I saw to that knee took place from those other occasions, and how much came from slipping on the tie; I am presuming, in my opinion, that he had a well knee to start with.

35 Atrophy is the shrinking of a muscle or tissue. That will take place any time from nonuse of it. If the muscles are not working it is bound to atrophy. As to how much atrophy he has will depend upon how much he is able to use his leg; the muscles do not necessarily atrophy from an injury of that character, but from nonuse of the muscles.

Dr. R. S. SPILLMAN, witness for plaintiff, testified as follows:

Direct examination:

I live in Norfolk, Virginia; am a physician. Was educated in New York City, University of New York and Bellevue Hospital Medical College. Am a licensed physician in the State of Virginia; have had hospital and surgical practice in addition to general practice. I spent three years in Bellevue Hospital in New York, three years in the United States Army, and had large brigade hospitals under my entire care and charge.

(It is admitted that the witness is an expert.)

Mr. Nelson came to see me; I think it was the 31st day of August, 1914; he told me he had a game knee and asked me to examine it. I always ask the question how they are hurt and get all the history possible in regard to the case. He told me he had been surveying and slipped and fell on the track and knocked his knee out of place. When I examined him he had his knee strapped with a lot of ad-

hesive plaster. I took that off and found the knee perfectly movable. You could take it with your hand and instead of staying in front you could shove it clean around on the side, probably two and one-half inches out of place to the left further than it should go; the knee was not swollen very much. It had been some time then, but he had practically no use of that leg; he had to swing it and drag it. The ligaments were bound to have been torn, destroyed. I do not know about the cartilage, whether they were injured or not. I saw him about the 17th of December, I think. I have seen him since I have been here today. In my opinion, the injury to the knee is a permanent injury. Take any joint, you have two sets of joints, one called the ball and socket joint, that gives freedom of motion; the other is a hinge joint. You take a door and pull the screws out and split the woodwork, you can not get that back; you can cut out the whole section and put in a new section, but you can not splice a leg that way, and when a joint of any kind is torn up badly it is always weak and will continue to give you trouble. He is crippled and that covers the whole word; the man never will be able to get around; of course men get around without a leg, but it is an effort. An injury of that kind is bound to upset a man's general nervous condition; he is timid, he can not get around, he can not do the things he used to do, he can not do the things other men can do; if he goes out with strangers he is bound to feel it. Those things will get on your nerves after awhile. I have known Mr. Nelson since he was a small boy, thirty-five years; I know his general character; it is good.

Cross-examination:

He did not tell me about the injury in his boyhood to his knee cap; he did not tell me anything about falling off a bicycle and injuring his knee; I think he mentioned the injury at Reedy Fork wreck.

Dr. H. H. OGBURN, witness for the plaintiff, testified as follows:

Direct examination:

I live on Church street; am associated with Dr. J. W. Long; I work under him as assistant. I was educated at Johns Hopkins, Baltimore; I am licensed under the State laws of North Carolina.

(Witness is admitted as a medical expert.)

I operate an X-ray machine at my office. I took a picture of the patient's knee on the 12th and one on the 15th of this month; I have one of the normal knee and one that has been damaged, and a comparison of the two is the best way to see the trouble; on his right knee, that is the normal knee, the outline of the lower part of the bone of the thigh is perfectly clear; the distinction between the two bones and between the knee cap, as you can see, there is a perfectly clear mark between there, and the outline of the bone is regular; the side of this knee cap I take to be normal

has never been damaged, so I take it his right knee is normal as compared with the left; on the other knee the outline of the bone is not regular; there is a cloud between the knee cap on this plate here and then there is a little projection just beyond where the knee cap rubs on the bone from the thigh; perhaps the size of the left leg is a little bit smaller as you see by the shape; the left leg is smaller than the right. The injury is a permanent injury; he could not have that much destruction in the joint and a formation of new substances without having a permanent injury to the joint.

Cross-examination:

I don't know when that injury took place; as to how long the knee has been in that condition I do not know; I know nothing more than that he told me; I could not judge from the plate; I saw the two legs and examined them; I was merely describing the picture; I could tell by looking at his two legs that one was smaller than the other, but I was describing what I could see on this picture. If the knee or leg is bound and tied up, that causes it to atrophy, nonuse of the muscles would make that; any injury to the leg that would stop the use of it; if it is bound up long enough it would atrophy; I could not say that the injury to the knee cap alone caused the atrophy, because if it stopped the action of his knee the muscles would atrophy whether it was in a bandage or not. If the jury shall find from the evidence in this case that the plaintiff received an injury when he was playing football as a boy, dislocating his knee cap, that he afterwards fell from a bicycle and received an injury which dislocated that knee cap, that he afterwards was injured in that knee by a railroad wreck, to such an extent that the bone of the knee cap attached to the large bone of the leg, so that it had to be broken loose from the larger bone, and from that injury received in the railroad wreck he went on crutches from some time, those things might be responsible for the condition I found there.

38 Of course I could not separate the things that have caused this condition in the knee; all I could say is that I find the condition now; I could not say which one of those things caused it. All of them summed up could have caused it; all I know is about this plate.

MARSHALL STEWART, witness for plaintiff, testified as follows:

Direct examination:

I live in Greensboro; in the hardware business; have known the plaintiff, Mr. Nelson, for twelve or fifteen years; he boarded at the same place for quite awhile. I know his general character; it is good. I was boarding with him prior to the Reedy Fork wreck; his physical condition was perfect so far as I was ever able to observe; I was associated with him for three or four years and he was always the leader in the pranks that a crowd of boarders boarding together would play; he seemed to be a very athletic kind of fellow, did not seem to be any physical defect that I observed. I saw him after

the Reedy Fork accident; the first few times after the Reedy Fork wreck I saw him he was on crutches; I remember meeting him on the street one day and he was walking with a cane; later I saw him go along the street as he did formerly, did not seem to be even any limp in his walk; since then I have had occasion to see him and observe him up to the time of his last injury; it seemed he was perfectly well up to the last injury.

R. W. STUMP, witness for plaintiff, testified as follows:

Direct examination:

I live in Washington, D. C.; am a practicing attorney there. At present I am in the office of the Comptroller of the Currency, John Skelton Williams, as an attorney. I am formerly from Richmond; I have known Mr. Nelson for about thirty years. I saw him from time to time in the years 1913 and 1914, occasionally we would come together. I was rooming with him at the time of his injury; had been rooming with him about five or six weeks; I knew him before the Reedy Fork accident; shortly after that he walked
39 with a crutch and I was very fearful that he was permanently injured, that was my own observation and thought; later on I saw him some months later, and apparently he had entirely recovered, walked with perfect freedom on both feet and legs, and put his whole weight on them, and before this last accident we were rooming together, and I observed him in the room with him in his underclothes; I could see everything, and so far as outward appearance goes there was absolutely nothing the matter with either of his legs, strong in both and walked with elastic stride in both of them, and we took long walks together in Richmond. When we roomed together I could not see any suggestion of atrophy of his leg; if there was, it was imperceptible; it was so slight. I saw him on the night he returned from Keysville; he was undressing; I suppose I was already undressed or undressing, and he sat on the side of the bed and started to rub his knee, nursing his knee; he said it was giving him a good deal of pain; I could see that from the expression of his face; he said that while he was at work he had stepped on a rotten crosstie and it had thrown him and hurt his knee; the knee was badly swollen at that time; the swelling subsided some since; he stayed in Richmond after this accident for about I should say two weeks, and his leg did not seem to get any better; he was going to see the Southern Railway doctor; he found it necessary to have surgical or medical attention with respect to his knee, because it was not getting better; it was getting worse. I know Mr. Nelson's general character; it is good. Prior to this injury the plaintiff attended dances; he was very fond of dancing and did a great deal of dancing, very good dancer.

Cross-examination:

As to outward appearance his leg was all right; the outward appearance shows to some extent the inner condition; you can see that

his knee cap is off on one side considerably, and that is the condition today. I was talking about his recovery from his former injury when I said the outward appearance indicated that it was all right; as to what the X-ray picture would show I do not know; I can not say definitely, but I have not seen him dance in about six or seven years, I should say; that was before the Reedy Fork wreck; that is the last time I can positively recollect.

S. D. NEWTON, witness for plaintiff, testified as follows:

Direct examination:

At the time of plaintiff's injury in 1914 I was office engineer; I had general supervisory control over the engineers who were working on what is known as the Northern District of the Southern Railway Company. That includes in general terms all the tracks north of Salisbury of the Southern Railway. That included the line of road from Richmond to Danville. Mr. Nelson was working under me; he was sent to Keysville to make a survey of certain track changes which were required by the operating department for the proper handling of trains; it was a rush job; the general superintendent was in a hurry to get the information to submit it to his superior officers; I am an engineer myself; I heard Mr. Nelson describe how he marked the stations in doing his work; the custom is not, you might say, universal, but it is the usual custom to mark the stations on the inside of the rail on the flange; in some cases, of course, it is marked on the outside, but the usual custom and the most convenient place to mark the stations is to mark on the flange of the rail. You have to check them up the same way you mark them up, walking between the rails; I can not say as to that particular location whether they were physical valuation stations or not; there were in a good many places in the district those physical valuation stations; he reported to me the next day, reported that he had fallen on a rotten cross-tie and hurt his knee; I did not see his knee at that time; I know the condition of the track with relation to rotten cross-ties, in a general way; I made no special examination of that particular piece of track; I have no general information of this particular piece of track; some months previous to the time Mr. Nelson met with his accident, probably four or five months previous, I had been over this piece of track; there had been no change in it to my knowledge; I do not know of changes when they were made in the track; the condition of the track was not reported to my office; I had no jurisdiction over maintenance of track; my work was entirely in the engineering department. When I first came to this office as assistant engineer I found Mr. Nelson there as assistant engineer; that was January 1, 1912. How long he had been working previous to that I have no knowledge. He continued to work up to the time of his injury. The character of Mr. Nelson's work was good; he was considered a good engineer; he did general engineering work the same as I did, the same as other assistant engineers did. His duty was to go out in the field and

make surveys for sidetracks and extension of sidetracks, also make surveys for other purposes as the railroad company would desire. I never heard him make any complaint as to the condition of his legs, and so far as my personal observation went his legs were perfectly sound. He was satisfactory to me as representing the Southern Railway. The Southern Railway Company has printed rules and regulations in which they set forth what a standard tie was at that time; a standard tie, according to my understanding, was seven inches deep, nine inches wide, and eight and one-half feet long. I know what standard ballast was given in their rule book; ballast was supposed to fill up the space at the center of the track between the ties, and if my recollection is not faulty, it extended beyond the end of the ties for something like two or two and one-half feet. I do not know what the ballast was there at that time. I have known Mr. Nelson since January 1, 1912; I know his general character; it is good.

Cross-examination:

Mr. Nelson was in the same office with me, both before and after his injury; he did not stop work at once after his injury; later on he came to me and asked to be given leave of absence to consult a physician; it was some days, I do not remember just how many days it was; I should say he went on doing his usual work
42 ten days or two weeks; I would not like to make that as a positive statement. He then asked for leave of absence to consult a physician; I can't say how long the absence was. I did not give him any long absence; he came back then and went to work and performed his work afterwards until he left the service of the railroad. The duties of an engineer take him out to do all classes of construction work, to make surveys for it. He not only had to work where the track was level and where the ground was level, but in all sorts of rough places, and he had to work where the track was rough and uneven as well as where it was smooth; he had to work where the track was ballasted and where it was not ballasted; he had to work where they were taking out defective ties and putting in ties, and where they were not. He had to work where they were defective as well as where they were not defective. In doing that work he necessarily had to look out where he was stepping for his own safety; he had to take the proper precaution, of course. As a usual proposition, any small defect we generally did not report; any glaring defect, such as would work to the danger of the use of the track for operating purposes we would of course report at once to the nearest trackman and later to the proper officials. One decayed crosstie in the track would not injure the operation of the road; it would not be detrimental to the operation of the road if the other ties were sound; if it was not ballasted entirely to the top of the crossties that would not necessarily affect the proper operation of the road. If it remained for a long time in that condition it would, not for a short period probably. If it was not ballasted in one place between the ties it would not affect the proper operation of the road. I am ac-

quainted with the general condition around Keysville; the railroad runs right through the business portion of the town, near the middle; the main business street springs from the neighborhood of the railroad and runs from that in a southerly direction, as I remember. The track has some grade along there; there is a cut; there is a cut between the depot and the water tank, I can not say exactly how far it is from the depot; the cut is on both sides. There is

43 a walkway on both sides of that track so far as my recollection goes. The checking, of course, has to be done from the same side the stations are marked on the rail; sometimes they are marked on the outside, more generally marked on the inside; we do it either way, according to the convenience of the particular instance. If it is marked on the inside it could not be read from the outside unless you have a machine that can look through a steel rail. If you are walking on the outside of the track and the mark is on the inside of the opposite rail there is nothing to prevent you from seeing that; no, in that case there is nothing to prevent, provided your mark is of sufficient distinctness to be seen that distance. Marking with that sort of chalk the mark is sufficiently distinct as a general proposition; it is no unusual thing in doing your work for you to check up the stations after you mark them, that is customary. That would not indicate anything unusual; I am no longer in the service of the Southern Railway Company; I am engaged in the practice of my profession as a civil engineer in the city of Goldsboro, in this State.

Redirect examination:

People, in addition to walking along the walkways, walk along the track, in the middle of the track; the walkways on either side of the track were permitted to be used by the railroad. The unsoundness in an oak tie generally exhibits itself early, if not first, at the heart of the tie, showing, of course, in the ends of the tie; sometimes it is determined by sounding the tie with an iron or steel rod; if the decay is of sufficient extent when it is sounded with a rod it will be disclosed by the sound; the engineering department does not have that part of the work of looking after the condition of the track; do not know how long it requires an oak tie from the time it is put in as a new tie to become decayed from the heart so that two or three inches of the face will break off by a person stepping on it; that is rather a difficult question to answer; it depends largely on the different varieties of the tie and to a large extent on the separate specimen of the same time. For instance, a white oak tie

44 will last much longer than a red oak or black oak; the white oak tie would have the longest life in the track and red oak would have a longer life than black oak, if it was used. I believe the custom generally among railroads is not to use black oak for that purpose. The life of a white oak is from five to seven years. Mr. Fred Dobbins went out as rodman to Mr. Nelson; he is fourteen years old.

Recross-examination:

There is a difference between the life of a white oak and that of a red or black oak; the white oak tie lasts much longer; it is considered the best class of tie. As a general proposition the red oak and black oak are more inclined to decay from the center than the white oak and post oak; in the white oak and post oak the sap wood decays off first; if the decay is of sufficient extent in the center you can tell by sounding; it might be partially decayed without being discovered, even though you sound it; if it is a white oak tie there might be sufficient decay for the sap to begin to decay on the outside without any serious injury to the tie, and that would be the natural way to do; a tie might be altogether good tie, strong and capable of sustaining the road for the purpose of operation, and yet have the sap on the outside decayed.

C. W. HIGGINS, witness for plaintiff, testified as follows.

Direct examination:

I know Mr. Nelson; have known him for five or six years; I worked for the Southern Railway Company with him as rodman; I was rodman for him beginning the year 1912, I think, until about April, 1913, a little over a year. Our offices were here in Greensboro; we worked out from there. So far as I could tell, apparently his leg was normal; he could move around as good as I could in the field, walk the same distance and the same speed I could; sometimes we would have to get off at a small station and walk in the country three or four miles and make a survey for a side-
45 track, maybe, and walk back to catch a train, and sometimes we would have to walk pretty fast in order to catch the train. We had transit rods and tape line; Mr. Nelson carried the instrument; I think the instrument, including the tripod, weighs twenty-five or thirty pounds. It all depends on the make of the instrument; we had a pretty heavy instrument, about as heavy as made; we did not usually carry the boxes, we left that at the station and carried the instrument.

Cross-examination:

In doing our work we had to go over all classes of places; we had to go over rough country as well as smooth; we had to go over rough track as well as smooth; I don't remember being out with him where they were constructing new track; we had to go over places where there -as no ballast as well as places where there was; we had to go over all sorts of uneven territory in making our surveys; we had to go over places where the cross-ties were worn as well as those where they were not; we had to go over places where cross ties were defective from decay as well as where they were not; an engineer in his work was not required to have a smooth pathway in doing that work; we did not expect anything of that kind; we had to be constantly on our guard as to where we were going; we had to watch, yes. I am not working for the railroad company now.

R. M. MIDDLETON, witness for the plaintiff, testified as follows.

Direct examination:

I live in Greensboro; am receiving teller at the Greensboro Loan and Trust Company; I know Mr. Philip Nelson; have known him for about ten years; know his general character; it is good. Knew Mr. Nelson before the Reedy Fork accident; I had never noticed any defect in his leg; his physical condition with relation to his legs was good, I suppose, apparently so. I have seen him off and on since he discarded his crutches from the wreck; I have seen him limping off and on and seen him walking with a cane, as he is now; I don't know after the Reedy Fork injury what his condition as to locomotion up to the time he was last hurt was.

46 Cross-examination:

I said that I saw him limping after the Reedy Fork injury; as to whether or not limping ever stopped, I don't know.

R. C. HOOD, witness for the plaintiff, testified as follows.

Direct examination:

I know Mr. Philip Nelson; have known him about three years; his character is good.

Z. V. CONYERS, witness for the plaintiff, testified as follows.

Direct examination:

Am engaged in the drug business in Greensboro; I know Mr. Philip Nelson; have known him for six years; know his general character; it is good.

R. L. JUSTICE, for the plaintiff, testified as follows.

Direct examination:

Am engaged in the wholesale drug business; I know Mr. Philip Nelson; have known him, I should say, three years or a little longer; know his general character; it is good.

H. J. THURMAN, witness for plaintiff, testified as follows.

Direct examination:

I am in the lumber business; know Mr. Nelson; know his general character; it is good.

A. J. KLUTZ, witness for plaintiff, testified as follows.

Direct examination:

I am proprietor of two drug stores in Greensboro; know Mr. Nelson; know his general character; it is good.

Plaintiff rests.

Defendant moved the Court for judgment of nonsuit. The Court reserved its decision until the close of all the evidence. Defendant excepted.

Second exception.

47

Defendant's Evidence.

Dr. A. R. SHANDS, witness for defendant, testified as follow:—

Direct examination:

I am engaged in orthopedic surgery; have been practicing medicine for thirty-one years; have been engaged in orthopedic surgery twenty-two years; that is that branch of surgery that has to do with the prevention and correction of diseases to joints. I live in Washington, D. C. I graduated from the University of Maryland in 1884; I practiced seven or eight years in Virginia, and then I took up the special work of orthopedic surgery, and spent two years in the hospital for cripples in New York City, and then located in Washington in 1884, where I have been engaged in practice and in the teaching of my profession. I have taught about eleven years.

(It is admitted that the witness is a medical expert.)

I have been orthopedic surgeon for the Southern Railway for eight or nine years; I might probably be better known as consulting surgeon; I do not come in contact with acute cases; it is usually cases requiring special treatment following injury at some remote period. The Southern Railway Company is not my only patient; I am in general practice; that is only a small part of my work; I am connected with two hospitals in Washington, that is, on the board of directors and attending staff of the George Washington Hospital and also the Central Emergency Hospital. I had occasion to examine the injured knee or leg of Mr. Philip Nelson; I first saw Mr. Nelson on April 16, 1910. He was referred to me on account of a stiff knee that he had. As I stated, he came to me April 16, 1910; upon examination and taking a history of his case as given by himself, that he had been injured in this wreck at Reedy Fork; he at that time had practically no motion in the knee joint; in other words, he had a stiff knee joint; an X-ray picture was made at the time; I have the X-ray picture; it was taken under my supervision and has been in my possession since the date it was made; it was taken in the X-ray laboratory in the hospital in which Mr. Nelson was;

48 taken under my supervision, under my direction. I do not recall that I was actually present supervising the job, but it was referred to a very competent radiographer who did the job, Dr. Grover. I don't know that it was ever shown to Mr. Nelson; I do not recall; it is very probable that it was, I am not positive about that; it is a part of the records of my office in the hospital. I made an examination of him in the hospital, by manipulating the knee, and discovered that he had a stiff knee; the stiffness was the part that concerned me; the condition of the knee was that that usually fol-

lowed an injury such that the contour of the knee was changed as a result of the injury, and upon examination I discovered that the knee cap or patella was adhering to the big bone or femur of the leg by strong fibrous adhesions. On April 20th, four days later, under a general anesthetic, that is, he was put to sleep, the knee was manipulated for the purpose of breaking up these adhesions and restoring motion; following that, within a few days, as soon as the soreness subsided, he was then referred to my office; he only remained in the hospital a short time and he came to the office practically daily for about a month; at that time we had the application of heat in an apparatus we speak of as a baking machine; it is an apparatus for the purpose of subjecting the joint to a high heat, and immediately following that it was given massage; he made good progress and was dismissed about May 30th. Then at that time the range of motion of the knee was practically normal and I think following that a few days I made my final report to the company on his condition, and then he passed from under my observation; I saw him no more until the 14th of July, 1914, that is, no more professionally. He reported to my office on July 14th with a history of having had this injury that has been recently described; at that time I found that the symptoms of an injured knee were altogether subjective, that is, he told me the knee was painful and was weak upon locomotion; the knee did not look like the other; a badly injured joint never looks the same; any more than a fractured one would look under the X-ray after it is united; there is quite a difference in the appearance of the normal knee from the other. That was so in 1910.

49 As I say, I only saw him at that time and on his complaining of this bone weakness I strapped his knee and asked him to report within two weeks, that I might see the condition. That was the last time I saw him until yesterday in court. There was nothing but subjective symptoms; other kinds of symptoms are objective; the difference between what you know as subjective symptoms is what the patient tells is the trouble, that he has pain; you can not see that he has pain, you take his word for it that he has pain; but if he has a broken leg, that is an objective symptom, you can see for yourself. In other words, one is something he tells you and the other is what you can see for yourself. In the examination of his leg at the time he came to see me there were no objective symptoms beyond the difference in the appearance of the two knees which existed at the time I saw him in 1910; I should say that the condition was practically the same as in 1910. There may have been some change; it would be reasonable to suppose that it had changed to a certain extent; injured joints never, as a rule, look the same after they have been restored to a perfect function, and the same would apply to injury to bones and structures in joints as shown by an X-ray. A fracture of a bone that has been perfectly united and perfect function restored can be located years later and has been located accurately by means of the X-ray.

(Witness examines X-ray picture introduced by the plaintiff.)

I see there is a difference in this place just at the upper border of the knee cap that seems to be a bony spur that has developed; I will say that that is where that knee cap was adhering to the femur at the time I broke it up in the year 1910; and when that was broken it left a raw surface there and I should say that that spur developed at the side of the old injury; that development is a very slow process; I should say from the appearance of that it existed there for a good many years; certainly it developed within twelve months of the injury of 1910. The difference between the X-ray taken there and

the condition I found in 1910, is the contour of the joint, 50 that is the normal margin of the articular surface is not as clearly defined as the one I made in 1910. From my exami-

nation there is something appearing upon that plate that would not appear from the condition I found the knee in in 1910; I think the development of that bony spur and the difference in the margin of those bones probably did not exist at that time; that is merely an expression of opinion, because there is no way of determining that except by means of the X-ray. The difference in the margin of the bones could have developed from the injury of 1910; in my opinion undoubtedly the spur did develop from the injury of 1910; I examined the tendons of that leg at the time I made my examination when he complained of the injury at Keysville; I did not detect any broken ligament or tendons. If the jury shall find from the evidence in this case that Mr. Nelson had his knee cap dislocated while playing football when he was a boy, that thereafter he fell from a bicycle and had his knee cap dislocated from an injury received then, that thereafter he was in a wreck at Reedy Fork in 1909 and had the joint of his knee injured so that he had to go on crutches for several months thereafter, and that in May, 1910, it was necessary to perform an operation upon him to break the knee cap loose from the femur or large bone of the knee, in my opinion, independent of the injury complained of as being received at Keysville, the condition which I found from that X-ray photograph introduced by the plaintiff and which has been shown me, would exist. My opinion is that the condition as shown by that X-ray which I have just examined was caused by an injury received several years ago. The condition there developed in that bony spur is a very slow process and did not occur as the result of an injury that was so slight as to enable a man to continue his work and come to see me two or three weeks later, being the first physician he had occasion to call upon. Mr. Nelson gave me a history of having his injuries to his knee previously which was noted on my note book at the time. He described it as having had his knee cap slipped out of place on certainly several occasions,

also that was one of the things he noticed in this injury at 51 Reedy Fork, that his knee cap was way around on the side, but he said he had had that to happen—that is, had had the knee cap to be displaced—before. A note was made of that in the history on my note book at the time. I have no recollection of telling Mr. Nelson when I examined him for the injury at Keysville that one of the *algments* of his leg was broken by that injury; I did not discover the breaking of any ligament.

Cross-examination:

In my examination of Mr. Nelson for his Keysville injury I only made a short cursory examination. I suppose I devoted ten or fifteen minutes, possibly more than that. Quite a little time spent in conversation about what he told me as to getting hurt. I never saw him afterwards. I am not an employee of the Southern Railway Company; I am a surgeon they call in and refer to. I am not a salaried employee. I have served in the capacity of a witness quite a number of times; I have no fee table to go by, and I only charge for my time; I frequently appear for them as a witness; I have made charges say from fifty dollars to two hundred dollars for appearing outside of Washington per day; I have had that relation with them since 1903 or 1904, eight or ten years. I get quite a little work from them. When Mr. Nelson was sent to me from the Reedy Fork accident he was first in the Emergency Hospital and afterwards he came to my office; he would walk up to my office; his knee got practically normal, as far as function was concerned, and I discharged him. I reported to the authorities for not as a perfectly normal knee; I reported it as well, not perfectly well. I know Mr. Perkins who lives in Washington; he called to see me about this case. I reported to him from the note book I had that the motions of the knee were normal; I meant to indicate by that that he was over the worst effects. He had not yet discarded crutches when I last saw him; do not know whether he did so afterwards; I know that the railroad company settled with him on the basis of my report.

52 Q. If the jury should find that after that the Southern Railway Company employed him as a civil engineer and for one and a half or two years he climbed over hills and rotten cross-ties, unballasted roads and hills, and did so with ease and without limping, and walked long distances and fast to catch trains, and did not limp or show any inconvenience or suffering from it, would you say that he was suffering now from an injury from slipping his knee in a football game as a boy? His present condition would not come from his knee cap slipping from playing football as a boy?

A. Considering the conditions you describe he was able to do, I would say he had practically a normal knee joint.

(The defendant in apt time objected to both question and answer; objection overruled; defendant excepted.)

Third exception.

I can not say he is permanently injured now. I examined him only once and I have no knowledge of his present condition. I possibly told Dr. Maphis, who was on the stand yesterday, after his examination, that I agreed with him that his knee was permanently injured now, or something to that effect. Also in this conversation about the Reedy Fork accident I assured Mr. Nelson that his knee would get well.

Redirect examination :

I could explain this best if you would allow me, by repeating the conversation with Dr. Maphis; he was discussing it and he told me of the conditions he found, and my impression is I said, such being the case, I would agree with you that he has more or less permanent injury, but it is not based upon any examination of my own. I was assuming that what he said represented actual conditions. My opinion as expressed was not based or predicated upon what I had found or seen, absolutely not. I do not know as to the symptoms described to me in that conversation by Dr. Maphis, whether they could or could not date back to the original injury, I can not say;

53 considering the fact that he has been having a practically normal knee during the intervening years, I should think he should have had some other injury to have caused a condition as described by Dr. Maphis as existing. I did not find any such condition as described by Dr. Maphis to me, but several months intervened between my examination and that of Dr. Maphis; other things may have happened in the meantime.

Recross-examination :

I have known Dr. Maphis quite a number of years; he does not live far from me; I have had occasion to see him frequently; I know his general character; it is truthful so far as I know; he is a good general practitioner; he does not pose as a surgeon; I know Mr. Philip Nelson, the plaintiff, have known him in a professional way since April, 1910; so far as I know he is of good character; I never heard anything to the contrary; he lives here, I live in Washington; I said so far as I know. My wife has many relations in Warrenton and we often visit there.

D. S. GAULDING, witness for defendant, testified as follows—

Direct examination :

I live in Keysville, Virginia; am agent of the Southern Railway Company, also Yardmaster at that point. I have been agent and yardmaster there about ten years. I have been working for the Southern Railway at that point since 1900; I have been over the track spoken of several times every day for the past ten years, with the exception of Sundays; was over the track practically several times every day in June, 1914; it is my duty as yardmaster to be on the yard a great deal and I had occasion to go over that track quite often; I was in Keysville in June 26, 1914. Mr. Nelson, Mr. Fred Dobbins, Mr. J. F. Hudspeth and myself; Mr. Hudspeth was superintendent of the Richmond Division at that time; I was present with Mr. Nelson when Mr. Hudspeth, the superintendent, gave his directions; we went over there before the survey was started, Mr. Hudspeth, Mr. Nelson, Mr. Dobbins and myself. Mr. Nelson went over this portion of the yard twice with me, he went down to the end and came back to the depot; that was before he began his

54

survey. Mr. Nelson, Mr. Hudspeth and myself walked along the track; we walked some inside the rail and some outside; there were four of us together and I cannot recall where each one walked on the track; some were on the inside of the rail and some on the outside. The portion of the track between the depot and the tank was rebuilt in August or September, 1913. On June 26, 1914, I know the condition of the track, the track had been in perfect condition at that time; it had been recently rebuilt and all the ties were good, sound ties and cinder ballast had been put in to fill the holes between the ties and it was all practically level; I have had occasion to examine it lately; I have daily. It is practically in the same condition now that it was in June, 1914; there has been no change in the crossties since that time; I know Mr. W. W. Roberts; I had a conversation with Mr. Nelson the other day when he was at Keysville; I saw him around in the reception room and I spoke to him and told him I was glad to see him and remarked that I hadn't seen him there for some time and he said no, it had been some time since he had been there, and he remarked the last time he was there he was riding on a pass and I said, aren't you riding on one now, and he said no, and he asked if Mr. Lockerby had been up there after him and I told him Lockerby had been there but I didn't know what he was after and remarked he had a suit and the train was coming in about then and we walked out there, and I asked him what kind of town Greensboro was, and he said it was a nice town and I said, I may be through there before long and stop over and see it, and he said, they aren't going to have you down there as a witness, and I said I believe so, and he asked if Bill Roberts had showed me the tie, and I said yes, and he remarked, he was a good mind to kill him, in a joking way. The tie was located 300 or 350 feet north of the depot on the main line; the tie was a little under size; it is perfectly sound and will last for two years longer; the ballast now and has been on the walk is level with the exception of that particular tie is possibly an inch higher than the rest of the ties along that part of the walk. The rest of the ties are perfectly sound. I made an inspection and investigation to ascertain their condition by walking over the ties and examining them; I examined all the ties from the depot to the tank; the ballast in June, 1914, was filled in between the ties, even with the ties, making it a perfectly smooth walkway; the same condition exists now. With respect to this place where I was shown this tie by Roberts it is about 100 feet from the depot platform; it is not a part of the place where passengers alight from the trains; on either side of the main line has a good walkway; good walkway on the right hand side and has been a good walkway on the left side until the additional tracks were put on the left; it is not a good walkway now. The additional tracks are those that Mr. Nelson was making survey of at that time; there was a good walkway on either side; the tie was a white oak tie; it was a tie rather smaller than usual, but was perfectly sound and was a little rounding in the middle; I suppose in the center of the tie it had a face of possibly three and one-half or four inches, I did not measure it. Superintendent Hudspeth was with me at the time. I don't know

his position now; I have heard he is not superintendent now and I have not seen him for several months.

Cross-examination:

I have been in the employ of the Southern Railway Company 23 years, but not at that point; am still in their employ; they rebuilt the track the latter part of August or first of September, 1913; they took up all the unsound ties; I don't know how many they took up at that time; I cannot arrive at what per cent, any conclusion as to that; they took up most of the ties, in fact they rebuilt the track. I cannot say that they took them up because most of them had gotten so rotten they could not run a train on them; they took them up because they were in unsound condition; those that they left there are perfectly sound. I know Mr. Burton Marie, civil engineer for the State of Virginia; I have only seen Mr. Marie once since he left the service of the railroad, and then he was there investigating the bridge, and had nothing to do with the repair of the track. I did not read his report as engineer of the State of Virginia; I have never seen a report from Mr. Marie; Mr. Bernard never called my attention to it; I have seen him frequently though; I have spoken of Mr. Roberts, but I cannot tell you where he is; Mr. Roberts did not tell me he had accepted a subpoena from Mr. Nelson to attend here as a witness and had written his acceptance on it. He did not tell me that he had agreed to come here and testify as a witness for Mr. Nelson; I have no idea why he is not here; he got off the same train Mr. Nelson got on last Monday; I was talking with him about the matter before he approached me on the subject; he told me he was a witness in the case; he approached me on the subject several times; I did not care to argue with him about it. He did not tell me that Mr. Nelson had given him money to come here as a witness; I did not say that the tracks are all filled up and bright new ties and ballast up to the depot. Some are older than others; all the ties that are there now were there before the middle of 1913; I do not know how long those that *they* were left had been in there at the time; all I know about this tie is that this man Roberts had a conversation with me and took me down there and showed me a tie and the tie he showed me was a small, round tie on the top; it set up in the track about an inch above the rest; the side along there was used as a walkway and sometimes on the middle of the track was used.

Redirect examination:

The ties they took out were, some of them, unsound and decayed; those they left when they rebuilt the track were perfectly sound.

G. E. WADE, witness for defendant, testified as follows.

Direct examination:

I live at Keysville, Virginia; have lived there about nine years; engaged in the hotel business; my hotel is right opposite the depot, just across the other track, about 35 or 40 yards from

the depot; I have lived there for 9 years; I have had occasion to use the track from the depot to the tank; I have walked down there once or twice a day for right much of the time for the past 4 or 5 years; I have been going there off and on ever since I lived there. I used to pump water for the railroad company and used to go down and see how much I had and used to go at night to drain the water to keep it from freezing; I am not employed by the railroad; I was not employed then by the railroad company. I do not furnish them water now; I have not furnished them water since Christmas; I saw Mr. Nelson when he was there the other day, he took dinner at my hotel; I do not know the name of the man who was with him; I saw them out on this piece of track between the depot and the tank; they were standing where Roberts showed us where the tie was; Roberts showed us the tie; with respect to that tie Mr. Nelson was there point- it out to the gentleman with him; that was the same place that Roberts showed us, I think the same tie; the condition of the track and ties and the ballast on June 26th was good, just as good as I ever walked over a railroad track in my life. The ties were all of them sound; I have made an examination to ascertain their condition. The first time I made a special examination was about September, I think, but I never noticed any special rotten tie before that; of course, I would not notice it specially. Mr. Lockerby asked me to make the examination; I looked at each tie as I got to it from the tank back to the depot; they were all sound; there was not a rotten tie in that part of the track; the condition of the tie that Roberts showed me and the tie where Mr. Nelson was standing pointing with his friend, was a small tie, did not have much face, and sorter looked like the sap had rotted or worn off, it did not have any sap, but the heart of it was perfectly sound and whole; it was a white oak tie; I decided to see whether it was sound, tried to stick my knife
 58 into it and kicked it; it was whole. On either side of the track in June, 1914, was a walkway, was a good path on either side; on the right hand side it was a good walk and a tolerably good path on the left side. With respect to the ballast between the ties that part of the track has always been ballasted good with cinders on account of the engines standing there and losing cinders; they even have to haul cinders away from there. There is no place between the ties 5 or 6 inches deep. There was not in June, 1914; it has always been ballasted good.

Cross-examination:

My hotel is just off the right of way of the railroad track; it is entirely off of the right of way; my yard is part on the right of way but it does not belong to me; there is no large number of railroad employees who board at my hotel, I have got one conductor that boards there; he does not drum for me coming in and out; he goes on a freight train; I try to stand in with the railroad company but I don't know whether I ever did; I pumped water at about cost, I got enough to pay for my gasoline that I pumped with; I don't know what my relation with the railroad company is; I tried to make some-

thing pumping the water, I expected to make something; I did not expect to get it as a witness; I came here voluntarily, Mr. Lockerby came and told me he wanted me to come over here; with just an expression from Mr. Lockerby I came. They did not say they would pay me a cent; I did not have a contract, not a thing; they did not tell me they would pay me for my time; they gave me a pass to come on; I just quit my business and came here to testify for him without any assurance of being paid for my time; I did not expect to charge anything for it. I am not expecting to get any pay; he simply asked me to come and I came; I have just done what they asked me to do so far, and do most anything anybody else asks me in reason; the path along the railroad people walk along either side of the railroad, and also walk down the railroad on the track between the rails; they could be seen there from time to time; all the heart seemed to
 59 be there of this tie; it is there now like it was when I saw it; all the sap had rotted off and as to how much of the heart was rotted I don't know; there was a great big piece left; the tie was rounding on top; the face was worn off and it was round; the heart was there, the sap was gone.

Redirect examination:

I accepted service of the subpoena; that is my signature; they could not force me to come but I accepted service; I have no interest in this controversy, I am not testifying differently for the railroad company than I would testify in any case where any other person was involved; I am a justice of the peace; have been so for about four years.

Recross-examination:

I was elected Justice of the Peace; the railroad people around there were not the ones who elected me as I know of.

H. D. PETERS, witness for defendant, testified as follows.

Direct examination:

I am cashier of the Bank in Keysville; also mayor of the town; been mayor for ten years. I live about a half a mile from the track spoken of. My place of business is about 100 yards away. I have occasion to see and go down this track almost daily; I live on the west side of the railroad; my home is possibly half a mile from the station on the west side; my place of business is on the east side of the depot, and, of course, going back and forth I have occasion to see and very often walk over this track. I have been familiar with it about 25 years. In June, 1914, between the depot and the tank it was in as good condition as it is almost possible for the track to be. That is the alignment is good, the ties are all ballasted with cinder ballast and it is all filled in between the ties almost level, that is as level as you could speak of ground. The last ties that were put in as well as I remember were in September, 1913, and of course

60 they took out all that was necessary, supposed to have been taken out at that time. There has been no work done there to my knowledge since and I pass it almost daily. It is in the same condition now as it has been for a number of years. I had the tie spoken of by the two preceding witnesses pointed out to me, Mr. Lockerby pointed it out; I examined it, it was sound. I made a minute examination of the ties between the depot and the tank; they were sound; the tie that was pointed out to me is possibly 6 inches or 6½ inches in width at the small end and about 9 inches at the opposite end. It is possibly raised anywhere from one-half to an inch above the others, that is by bearing up slightly in the center of the track; the filling around that tie is level with the rest and maybe three-quarters of an inch above the others and above the ballast at that point. The tie is sound; a white oak tie. In June, 1914, there was on either side of the track a walkway, just a cinder walkway. It was perfectly smooth as you would speak of ground being smooth.

Cross-examination:

This walk along there that I speak of 150 feet or further from the station, was used for a number of years at will by people who walked on either side or along the track towards the water tank; one end of this tie is about 9 inches broad and the other end about 6 inches; it is some narrower in the middle than at the end. I cannot say that all the sap had rotted off and what is left is heart. I cannot say that what is left is all heart, but my impression is that all sap is not off at the end. Some of it has worn off, I cannot say it is rotted off. Some of it has gone; I don't know where it went or when it went. It is ballasted now about three-quarters of an inch and I meant the tie is about that much higher at this particular point. It slightly bows up, the ballast is filled in so that it come to about three-quarters of an inch to the top. I am Cashier of the Bank; that is the only bank there.

61 W. R. STAPLES, witness for the defendant, testified as follows:

Direct examination:

I am in the tobacco warehouse business and general heavy hardware at Keysville; I am one of the councilmen of the city government. My place of business, I should judge, is about 140 or 150 yards from the main track leading from the depot to the tank. I have been familiar with this track for 9 years. I went over it sometimes every day or two, and sometimes a week or ten days; I went over it more often in June, 1914, than any other time; I am in the fertilizer business and very often look for a car of fertilizer and have to walk up and down and walk where the cars are stored on the switches, and wagons and buggies, two or three carloads come in every spring. I observed the condition of the track just by walking over it; it was the best walkway, as I said, we had around there; I never noticed the ties particularly until this spring; I noticed them

this spring. All the ties are sound from the depot to the tank; after I found out I was coming down here I thought I had better be in position to answer that question is the reason I examined them; I walked them over from one end to the other, back and forth; I kicked them, the only examination I did make; their condition was sound; I observed the ballast; it has always been practically level; right in the middle of the track, of course, the cinders are always higher than they are next to the rail; most of the time there will be just enough space under the rails so the water could probably soak out, I think; in the middle of the track ever since I have been there it has always been level with the ties, or about that; I have been there nine years. With respect to the walkway, the one between the main line track and the first sidetrack I should judge about 3 feet between the ends of the ties, two and one-half or three feet. That has always been as smooth as you could expect good cinders to get; the other side is not quite so broad, but it was a good walkway. It was in that fix in June, 1914. I have never seen any changes since I have been there. Mr.

62 Lockerby pointed out that tie there to me; he did not say anything particular about it until after we had been from the depot to the tank; I didn't see anything about the tie that was any different from what you would see all along the railroad; a little different shaped than some of them; the tie in question, I would take it to have been a crooked tie, just the least bit bent, and in hewing them hewed more off the bottom than in the middle, which naturally putting the smallest face on the ground would leave the middle with more sap. It seems to be sound, what there is there; it seems the sap has worn off. I know Mr. Gaulding; know his general character; have known him for 9 or 10 years; general character is good.

Cross-examination:

Mr. Lockerby is Claim Agent for the Southern Railway Company; he is the gentleman sitting behind the counsel; he pointed out one particular tie to me; I could not see the lower side but that is the only reason I could see why it should be more hewn at the end than in the middle; of course, the more you hew the more sap surface is hewn; what was left there was hard as a bone; the people have been using along there for a walkway ever since I have been there; the ties were good when I walked along that road; could not say they have always been sound, they were just good to walk on, that is all I mean to say. I cannot say how many they took out; they repaired the track; they took out a good many. I suppose from the looks of the ones that had been left that they were some that had been put in to repair the old track. I sell fertilizer there; I do not have a storage warehouse the railroad puts fertilizer in, I haul it to the warehouse. This is the only line of road there.

S. B. WARD, witness for defendant, testified as follows:

Direct examination:

I am a carpenter; I live at Keysville; I have lived at Keysville 29 years; I know Mr. Gaulding; know his general character; it is good.

I live about 400 yards away from the track, between the depot and the tank; I live on the street that crosses at the tank; I have lived in several places since I have been in Keysville but for five years I have lived about the same place; my opportunity for observing the track is it is better walking for me and then I sometimes happen attend to loading timber on the siding and would have to come to the depot to get out cars and get out the bill of lading and that was the best way and the only way I could go. I went over it sometimes 2 or 3 times a day and then again 3 or 4 days. The tracks were repaired about a year and a half ago; a good many of the ties were taken out, I did not count them. Ties put in; white oak ties, some sawed and some hewed; they were new; the condition of the track in June, 1914, was good; I had more business up there about that time than any other time. The condition of the ties were good and sound; the ballast was pretty good, good walking. Filled up between the ties, filled up level; I was there when Mr. Roberts pointed out the tie to me, pointed out a small tie down the road about 300 feet, something like that. The tie was an oak tie, a little smaller at one end than the other; white oak, big at one end and small at the other, tough, sound. I have observed the track lately, have gone over it, have made an inspection of it; the condition now between the depot and the tank is good; the ties are good; they are sound as any piece of track you can find anywhere. The ballast is good, good cinders and good walk. There is a walkway along on each side; it was about in the same condition in June, 1914, as it is now, good. I am a carpenter and accustomed to handling lumber; with respect to white oak ties they begin to decay from the sap, of course, the majority of them if they were sound; of course, there is a lots of trees dead that commence to decay from the heart; if they are sound when they are put in they commence to decay from the sap side.

I know Mr. Wade; know his general character; it is good. Know Mr. Peters; know his general character; it is good.

Cross-examination:

The gentlemen that they are asking me about as to general character are gentlemen who came over on free passes. Mr. Lock-
 64 erby spoke to me about being a witness in this case sometime last fall, I didn't know him before that; I happened to see him and he asked me if I lived at Keysville. He took me around the track and showed me a few weeks ago and at the time; I examined the ties and found them all sound; got down and took a knife and tried to pick in them; not every one, but those that were worn; you can tell a tie that has been in the road 2 or 3 years from one that has been there two weeks; I didn't get down and cut into all of them, I cut into two; I examined the track after walking over it like everybody else. I am not an expert trackman. I know that along this track between the station and this tank that the public have been using that for quite a long while as a passage way and walk along either side or on top. Know that the track about a year ago got so bad they had to take out about half the ties, something like that; I cannot tell how long before that the track had been repaired. They

keep it up, they put in a new tie occasionally, I reckon, if they need it. I don't know when they repaired the track before; those that were left there on that repairing are still there and there has been no repairing since.

W. E. HAILEY, witness for the defendant, testified as follows:

Direct examination:

I am postmaster at Keysville; occupied that position since July, 1913. I go over it practically every Sunday, I go to Sunday School, and I have some property on the other side of the railroad and sometimes I would pass over it once or twice a week, and then maybe it would be two weeks, but I average a couple of times a week. Been going over it this way for 10 or 15 years. As far as I could tell by walking over the road it looked like a good piece of road to me, in fact it looked better than the average roadbed I am in the habit of walking on. The ties looked sound and good; the ballast was practically level with the ties and it was a good piece of track. There was no place in the track that was five or six inches where the ballast was out between the ties; I have gone over it lately; I think it was
65 one day last week, I went over it a couple of times last week; it is in good condition. It is in good condition; it looks like good sound ties and it is level. I didn't have any particular tie pointed out to me in the track; I was not with the gentleman who was talking just now about a particular tie, but I examined all the ties from the tank to the depot.

I know Mr. Gaulding; know his general character; it is good. I know Mr. Staples; know his general character; it is good; know Mr. Peters; know his general character; it is good; know Mr. Ward; his general character is good; know Mr. Wade; his general character is good.

Cross-examination:

I said that one occasion I have in the past to go over the track was Sunday morning or afternoon going to Sunday School, and I said I had a piece of property the other side of the railroad and after office hours, 6 o'clock, very often I walk over there. The sort of property I speak of is an 83 acre farm land; I would not go that way every time I went to it; it was about a half mile from my place of business; I usually would go more for the walk than anything else; that is the nearest way from the post office to the farm, down the railroad; I occasionally went to the farm and on Sundays went to Sunday School; I was asked to examine this track inside of 2 or 3 weeks; I am not a railroad man; I never made an examination of it before with a view of testifying here; yes, I mean to say that one and a half years ago there was not any space between those ties from the station 150 feet that the ballast was not level with the ties; I mean to say that because I know it is a fact; to walk over a track I know there would not be six inches, I think I would have fallen in it if it had been there. I think I would have seen it; it is prob-

able that it could have been; I was taken there by the same law agent; I don't think I said I went with him; I wanted to examine the tie to testify to whether or not it was sound, I wanted to be sure; I was sure before, I was practically sure of its condition; I

66 thought it best to know you are right before you go ahead; I have had no promises made to me of anything whatever;

I signed the subpoena that he said he wanted to serve; he asked me if I would accept it and I just accepted it; I was glad to get the trip here, to see a North Carolina town; I found out whether or not the ties were sound by stamping the ties; you can tell that way, an ordinary man can tell a sound tie from a rotten tie by looking at it; where they looked like they were old ties I stamped them; that was the way to make sure.

A. B. HAMNER, witness for the defendant, testified as *as* follows:

Direct examination:

I am engaged in the mercantile business, hardware principally, at Keysville. I board at the Hotel about 100 yards from the track; I go over it probably two or three times a month; been going over it that way for the last 15 years; I know its condition in June, 1914; it was in good condition; I did not examine the ties at that time; I did not make a special examination but I was frequently over it and it seemed to be in pretty good condition; I have made a special examination on the 4th day of March and once since then, I do not recall the date this year; they all seemed to be in sound condition then. I did not notice particularly the ballast in June, 1914, but it has always been very well ballasted, the main line through there; it was ballasted with cinders; it was ballasted in between the rails with cinders all the way along from the depot to the tank; it come pretty near up on a level with the sills, I think. I made an examination lately, I walked over it and looked at the ties carefully so see whether or not they were sound; they all seemed to be sound to me; I went over it twice; I know Mr. Gaulding; know his general character; good; I know Mr. Staples; know his general character; it is good; know Mr. Wade; know his general character; it is good; know Mr. Ward; know his general character; it is good; know Mr. Peters; know his general character; it is good; know Mr. Hailey; know his general character; it is good. Mr. Lockerby and

67 Mr. Roberts pointed out the particular tie to me; the tie was a small tie, a little bulged in the center, a little higher in the center than it was where the rails crossed it, seemed to be mostly heart what I saw; looked like it had been worn off some from walking over, but it was perfectly sound; it was white oak.

Cross-examination:

The tie that was pointed out to me was a small tie, smaller than the others and sorter bulged up in the middle. All that was left was principally heart; of course, I cannot tell how much heart was gone, I can only tell what I saw there; the sap seemed to be gone, all

that was there was sound heart; never made a special examination of the road until the law agent asked me to go with him in March of this year.

J. H. DANIEL, witness for defendant, testified as follows:

Direct examination:

I am section foreman of the Southern Railway Company; was supervisor in June, 1914; my duties as supervisor were to look after the roadway, tracks. I had the particular part of the track from the station at Keysville to the water tank, under my supervision, in June, 1914. I went over it almost every day; going out and in from home and in going to the office, depot. We had a tool house on each side, one above the depot about 100 yards from the water tank; between that and the depot. Sometimes I would walk between the rails, sometimes on the walkway at the end of the ties, along the track. I was not in charge of the track in 1913 when the repairs were made; I came there in February, 1914; have been in charge there ever since up until the last of March; ever since I took charge the track has been all right; the ties are good; the track was good for ties and service and filling; the ties were sound; cinder ballast filled in about the level of the top of the ties; the walkway on either side of the track was good. I have gone over it lately to make an examination; I found it good; good for ties and service, ties were sound, the service of the line was good, the track was filled in with cinder ballast level with the top of the ties.

Cross-examination:

I occupied the position of Supervisor in June, 1914, of that division; I am section foreman now; I was reduced in rank; it was my division that this accident occurred on, and this complaint about the track.

Redirect examination:

I resigned from the position of the place I had as supervisor because I was tired of it.

Recross-examination:

I didn't get mighty tired of it after this accident, I didn't give it a thought.

T. A. SPENCER, witness for defendant, testified as follows:

Direct examination:

I am section foreman of the Southern Railway; I was supervisor in June, 1914; as section foreman and supervisor I have had charge of the track from the depot to the tank. In June, 1914, the condition was good; the ties were good and the service was good and the line was good and it was dressed uniformly to the top of the

ties; the same condition exists now. I mean by "dressed" finished up, filled in with cinders, that is what I call ballast.

Cross-examination:

I had charge of that part of the yards from the depot to the tank; since then I have been reduced in ranks; it is fixed up like it was at that time; there has not been any work done since September, 1913, on that part of the track; they made the usual repairs; sometimes they put out about one-third, sometimes one-fourth, sometimes one-half, that is the usual custom. It depends on the location.

69 W. T. DOBBINS, witness for defendant, testified as follows:

Direct examination:

I am Engineer of Maintenance of Way; held that position two years ago last December; I have what is known as the Northern District; the track from the depot at Keysville to the tank is in the Northern District. It is under my control, in a sense, more directly under the control of the division officers, though. In 1914 I had what is known as an office engineer, the assistant engineer reported directly to me; not being an engineer myself I never gave many orders to them. Those reports were made to my office to an engineer there; I did not observe the condition of the track in June, 1914; I have made an examination of it since then, probably three weeks ago; the track is in good condition now. The ballast and ties were good; the ties are all laid with 85 pound rail and cinder ballast, the track filled in to the top of the ties, everything to conform about the standard track. As to how a white oak tie begins to decay, there is a difference. One tie probably would commence to decay in the heart first and some of them the sap will commence. I have seen them almost a shell, rotten on the inside, and look sound on the outside. You know red oak and black oak usually decay in the center first, and white oak, I think, the sap will decay first.

I know Mr. Hudspeth; he was the superintendent; I don't really know his condition; he had a stroke of paralysis some time back and I have not seen him but once or twice since; he is not superintendent now.

Cross-examination:

He has the appointment of superintendent of terminals at Richmond but I don't think he has taken charge; since he had the stroke of paralysis he has been given the appointment of superintendent of terminals at Richmond. The man in charge of my office was a practical engineer, that was M.r Newton; the man that the plaintiff introduced this morning.

70 Dr. E. R. MICHAUX, witness for defendant, testified as follows:

Direct examination:

Witness is handed two plates or radiographs that have been introduced in evidence and asked to examine them.

I have been practicing medicine 26 years; live in Greensboro, North Elm Street; was educated at the University of New York; I have a license to practice, given me by the State Board.

(Witness is admitted as a medical expert.)

I am surgeon for the Southern Railway Company.

If the jury shall find from the evidence in this case that Mr. Nelson, while he was a boy, received an injury playing football to the left knee cap, displacing the same; that thereafter, in an accident while riding a bicycle, he hurt that knee so as to displace the knee cap; that thereafter in 1909 he was in a railroad accident that injured that knee so that he had to go on crutches for several months and the knee cap or patella adhered to the femur or large bone so that it had to be broken loose in an operation, under an anæsthetic; in my opinion, after an examination of the X-ray handed me the condition which you see there would exist independent of any subsequent injury which he might have received at Keysville. Inasmuch as this growth there, a bony growth, inasmuch as it takes considerable time to develop that sort of growth, I would say that undoubtedly the condition obtained from former injuries, that is from injuries prior to the one of last June; it takes considerable time to develop that sort of bony excrescence and with that in view I would be bound to say that I thought it due to former injuries.

Cross-examination:

I think it due to some injury received prior to last June because as I say it takes more time than that to develop a bony excrescence like that. I have been a surgeon for the Southern Railway Company about 14 or 15 years.

Witness is asked the following question:

71 Q. If the jury should find from the evidence that the plaintiff, Philip Nelson, while a boy had knee cap injured in a football game, and thereafter his knee was restored to a condition that he could walk and use it and take an active part in athletics with grown men, extending over a period of 4 or 5 years, with boarding house friends and men of the size of Mr. Stewart, if the jury should find he is a man about 180 pounds in weight and that thereafter he was in a railroad accident, and in a car that went off the track and down into the river, and stood in the cold water for two or three hours, and his knee cap was hurt again, and he walked on crutches and that he went under the treatment of Dr. Shands,

and if the jury should also find that he is an expert surgeon for the Southern Railway Co., and the jury shall further find that after treating him, Dr. Shands told him and reported to the company that his injury was not permanent, and that his leg was substantially well, and that thereafter the Southern Railway Company employed him as a civil engineer and for a period of two or three years he worked up and down the line and elsewhere, climbing in cuts and walking fast to catch trains, and carrying instruments of 25 pounds on his back, and walked so that those associated with him in work, and observing him did not notice that he was limping, and if the jury shall further find that his room-mate, who saw him undressed, noticed nothing the matter with his knee or his locomotion, and the jury shall further find thereafter that he slipped on a rotten tie and strained his knee, and if the jury shall find that thereafter physicians examined him who in the opinion of Dr. Shands was a reputable physician, and found torn ligaments and the cap displaced over on the side of his leg, and that he continued to suffer from that condition up to the present and that atrophy of the leg had set in, would you say that injury was the result of the last injury on the railroad in spraining his leg, or the football game when he was a boy, or the injury before at the time Dr. Shands discharged him?

A. If it could be proved—

Q. Which one of those injuries would you say in your opinion was the cause of his present trouble?

72 A. Naturally we would have to say the last injury was responsible. Then I would want to explain this way: It is a fact that the patella had to be dislodged, had to be torn loose, that set of a form of inflammation—

Plaintiff objects as not responsive to the question.

A. I merely wanted to explain how I thought the earlier injury might explain the present condition.

Q. You have already stated that and insisted it was because it was due to a slow growth?

A. I still insist on that.

Defendant closes.

Plaintiff's Rebuttal Evidence.

The plaintiff, Philip Nelson, exhibits to the jury both his knees.

Direct examination:

That leg is wasting away very much.

Cross-examination:

I have had it bound up for some time, ever since Dr. Shands first bound it up; it was in July, 1914; have not used the muscles of my leg since then.

Plaintiff closes.

Defendant renewed its motion for judgment of nonsuit. Motion overruled. Defendant excepted.

Fourth exception.

At the close of the testimony, and before his Honor's charge the defendant, in apt time, asked his Honor to give the following special instruction:

The defendant did not owe to the plaintiff, a civil engineer engaged in surveying the location of a sidetrack, the duty to provide a reasonably safe walkway between the track of its main line for his use in checking up the stations. The purpose of the track being for the operations of trains and there being no evidence that the track where the plaintiff was injured was not safe for the operation
73 of trains, then there was no breach of duty on the part of the defendant, and the jury should answer the first issue 'No.' "

His Honor refused to give this instruction and the defendant excepted.

Fifth exception.

At the close of the testimony and before his Honor's charge, the defendant, in apt time asked his Honor to give the following special instruction:

"The defendant did not owe the plaintiff the duty to have sound cross-ties in its track or to have the space between the ties filled with ballast, or cinders. The purpose of the ties and the ballast being to furnish a secure and firm roadbed and track for the operation of trains, and if the jury find from the evidence that there was an unsound tie and one vacant place between the ties not filled with cinders and that neither of these conditions made the track insecure or unsafe in the operation of the trains, then the jury should answer the first issue 'No.' "

His Honor refused to give this instruction and the defendant excepted.

Sixth exception.

At the close of the testimony and before his Honor's charge, the defendant, in apt time, asked his Honor to give the following special instruction:

"It was the duty of the defendant to keep and maintain its tracks, including cross-ties and ballast, in a reasonably safe and suitable condition for the purpose for which it was intended—that is, the operation of trains, and if the track, cross-ties and ballast at the place where the plaintiff was injured were safe and suitable for the operation of trains, then the defendant had discharged its legal duty and obligation. All risks and dangers that occur after a master has discharged his legal duty are assumed by the servant as ordinary risks incident to his employment, and if the jury find from the evidence that the injury to the plaintiff was caused by a de-

74 fective tie or lack of ballast which did not render the track unsafe or unsuitable for the operation of trains, then this was a risk assumed by the plaintiff, and the jury should answer the third issue 'Yes.' "

His Honor refused to give this instruction and the defendant excepted.

Seventh exception.

At the close of the testimony and before his Honor's charge the defendant, in apt time, asked his Honor to give the following special instruction:

"If the jury find from the evidence that as a civil engineer in the railroad service it was a part of the plaintiff's duty to walk along and over tracks that are rough and uneven as well as tracks that are smooth and level, upon tracks that are unballasted as well as tracks that are ballasted, to walk over old, worn and defective tracks as well as new and recently repaired tracks, then the risk arising from rotten or defective cross-ties and track not properly ballasted were risks assumed by him, and even if the jury find from the evidence that he was injured by stepping on an unsound cross-tie and slipping into the ballasted space between the ties, this was a risk assumed by him, and the jury should answer the third issue 'Yes.' "

His Honor refused to give this instruction and the defendant excepted.

Eighth exception.

After the jury had retired, and before the rendition of a verdict, the jury came into Court and through their spokesman said to the Court, when asked by the Court:

Q. "What is it you want to know?"

A. "We just wanted to get a mortality table if it is possible to get it."

The Court then said:

"Yes, the evidence tends to show that he was 36 years old. The expectation, according to the mortality table, is 31 1-10 years. That is evidence of a man's expectancy, made so by statute, but is not conclusive on the jury. You may take into consideration his

75 health and the occupation he is engaged in, his habits, etc., anything that bears upon his life expectancy, and consider the mortality table too, but you are not bound by the mortality table, and it is for you to find from the evidence what his real expectancy is."

Ninth exception.

Judge's Charge.

His Honor charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action brought by Philip Nelson against the Southern Railway Co. to recover damages for

an injury that he alleges he received in consequence of the negligence of the defendant.

You are the triers of the facts, gentlemen. You find the facts from the evidence as you collect it; if your recollection of the evidence differs from that of the counsel on either side or from the Court, you will rely upon your own recollection, and find the facts accordingly.

You take the law from the Court, and apply the principles of law which the Court gives you, to the facts as you may find the facts to be.

In considering and passing upon the evidence, you will note the difference between the substantive and corroborative evidence. Substantive evidence is evidence that is offered for the purpose of proving some fact at issue. Corroborative evidence is offered for the purpose of corroborating the testimony of witnesses who have testified to some fact at issue. So the testimony as to good character, if the witness whose character has been proven to be good, is only corroborative evidence, and offered for the purpose of enabling you to better pass upon the truthfulness of their testimony. The plaintiff contends that the evidence shows and that you should find, that he was 36 years old, that he was by profession a civil engineer, that he had been in the employ and was in the employ of the defendant railway company, on the 26th day of June, 1914; contends that the

76 evidence shows that on that day he was sent to Keysville, in the State of Virginia, to survey for some additional tracks that were to be put in at that place; he contends that the evidence shows that it was a rush order, that he was to make the survey that day and report the next day with his maps; he contends that when he got there and started to work, that he went over the main line running by that place or through Keysville, and that after he had made the measurements and had marked the stations that were proper and necessary for him to do, that he went back over to check up and to be certain that he was right he contends that the evidence shows that it was necessary for him to walk between the rails of the main line that some time previous to this occasion there had been marks, when the physical valuation of the road was being taken under the direction of the Government and that where he could find those marks that he took note of them; contends that the station marks made at that time were on the flange, on the inside of the rail, and that some of them had become dim and he could not see them by walking on the opposite side, on the outside of the rail, and could not see them by walking on the side on which the marks were made because he would have to bend over the rail to see.

He contends that he was in proper shape to perform the duty he was assigned to do by the defendant, and contends that the evidence shows that while in the performance of that duty, in observing and trying to observe the station marks he had made that he stepped on a rotten crosstie or a crosstie that was partly rotten; that the part on which he stepped broke about 6 inches in length and 2½ inches wide and an inch or so deep; that that threw him and that between

that tie and the next tie there was a space, the usual space between ties, and that the ballast had been permitted by the defendant company to get out of that space and it was 5 or 6 inches from the level of the tie to the top of the ballast between the ties; he contends that in that hole his foot was caught, and he was thrown, and his knee was injured, that his knee cap was displaced, put out of place; that he went to a physician and had it treated, and that he has continually grown worse, that he has suffered great physical pain
77 and mental anxiety on account of his condition; contends that up to the time of his injury and after he recovered from the injury received at the Reedy Fork accident, that he had been in good health and able to do the work of an engineer; and he contends that you should compensate him for the injury he received.

He contends that he was not guilty of contributory negligence; that he had a right to assume and did assume that the railroad track at that place, in one of the yards of the defendant company, near the depot, between the tank and the depot, was in proper condition, and that a proper condition would be to have sound ties and properly ballasted, ballast coming up to a level with the ties.

He contends that he could not perform his duty that he was then performing and look at every step that he was making, to see where to step.

He further contends that he did not assume the risk of that danger; that while he assumed the risk of the ordinary dangers incident to an employment of that kind, that he did not assume the risk of the danger in this instance; that by the use of ordinary observation he could not see that the tie was rotten, and that it was not called to his attention, and he had no knowledge of it and no reason to suppose or presume that it was in a rotten condition, and contends that he did not assume the risk of that danger.

The defendant contends, and asks you to so find, that the defendant was not negligent, and asks you to find that the plaintiff was not injured by the negligence of the defendant; contends that the plaintiff was engaged in ordinary work and sent out to make a survey for the purpose of installing some additional tracks at that place; contends that the evidence shows that the track between the station and the tank at the place where the plaintiff claims he was injured, was in good condition, that the road was properly ballasted, that the ballast came up to within one inch of the top of the tie, that the plaintiff claims he was injured at, by stepping on; contends
78 that the tie in question was a perfectly sound tie, that while the sap may have decayed—rotted off—that the heart was there, 3 inches or $3\frac{1}{2}$ inches across the face in the middle and wider at one end perhaps than the $3\frac{1}{2}$ inches at the other end, but narrower at one end than the other.

Contends that the ballast and the tie was in reasonably good condition; contends further that it was not necessary for the plaintiff to walk between the rails, that he could have done the work he was doing by walking on either side of the track, and contends that there was a well beaten path on either side of the track.

Plaintiff contends, however, that it was much easier for parties

using the railroad at that point to walk the middle of the track than it was on either side of the track.

The defendant then contends that the plaintiff was guilty of contributory negligence, and that it was his contributory negligence, his negligence, that caused the injury, and not the negligence of the defendant.

Defendant further contends that plaintiff assumed the risk of the danger, if there was any danger in the road or in the cross-tie at that place, that his duties as a civil engineer required him to go over roads that were not ballasted and over roads that had become old and cross-ties worn, and over new country where there was no road, in surveying for new roads, and that the plaintiff knew that his employment carried him to such places and in such conditions, and for that reason the defendant contends that the plaintiff assumed the risk of the danger incident to the work which he was doing on that occasion.

The defendant further contends that if you should find by your verdict that the defendant was negligent, and that the plaintiff did not assume the risk of the danger, and that if you should come to the question of damages, the defendant contends that the evidence shows that the plaintiff, when a boy, was injured in his left knee by having the cap dislocated, knocked off, playing football, and that some years afterwards, while riding a bicycle, that he was
79 thrown from the bicycle and the same knee cap was knocked off or displaced, not knocked entirely off, but displaced.

Further contends that the evidence shows that in 1909 he was in what was known as the Reedy Fork wreck, and on that occasion he was severely hurt, and hurt in this knee so much so that he had to go on crutches for some considerable time, had to have the leg bound in bandage, and to wear it in that rigid condition such a length of time that adhesions took place, and that the knee cap adhered to the femur or large bone of the leg to such an extent that he had to go under an anaesthetic and have it broken loose by severe pressure, and contends that the present condition of the knee, as shown by the X-ray photograph introduced by the plaintiff, was due not to the injury at Keysville, but to the former injury; that some of the experts testified that the appearance as shown there by the photographs, were of slow growth, and could not have been in the condition as shown by the photograph from so recent an injury, and the defendant contends that the atrophy of his limb and the condition it is now in was due wholly or partly to his former injuries, and not to the injury that he sustained June 26, 1914.

Now, gentlemen of the jury, these are the contentions of the plaintiff and the defendant that arise upon the evidence in this case. As I have told you, you are the triers of the facts, and you find the facts from the evidence as you recollect it.

There are four issues submitted to you. Your answer to these issues will be your verdict in this case.

You understand that the plaintiff is alleging and charging that his injury was caused by the defendant, and the burden is on the plaintiff to so satisfy you, to satisfy you from the evidence, and by

the greater weight of the evidence, that his injury that he complains of was caused by the negligence of the defendant company.

Now, negligence is the failure to do that which a reasonably prudent man would ordinarily have done under the circumstances of the situation, or the omission to use means reasonably necessary to avoid or prevent injury to others.

80 To establish actionable negligence, the plaintiff is required to show by the greater weight of the evidence, first, that there has been a failure to exercise reasonable care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man would exercise under like circumstances and charged with like duty. And, second, it must appear that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which no man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.

Contributory negligence is such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, concurring and cooperating with such negligent act or omission on the part of the plaintiff the proximate cause or occasion of the injury complained of.

The Court instructs you that it was the duty of the defendant to use reasonable and ordinary care to provide a reasonably safe place for the plaintiff in which to do the work assigned to him, and if the jury find by the greater weight of the evidence in this case that the plaintiff was sent by his superior officer to Keysville, Va., for the purpose of doing certain surveying and laying outside tracks for the defendant, and that this work was in part in the defendant's yard at Keysville, and that it was reasonably necessary for the plaintiff, in doing his work upon the track of the defendant, to walk between the rails thereon, and if the jury find by the greater weight of the evidence that while the plaintiff was engaged in doing the work assigned to him, that he stepped upon a decayed or rotten cross-tie which broke with him, and that the top of the ballast next to the cross-ties was several inches below the top of the cross-tie, and that this cross-tie and this defective ballast was at a point in defendant's track where it was reasonably necessary for plaintiff to go in order to do the work assigned to him, and that the defendant

81 ant had failed to use reasonable and ordinary care in keeping this track at this point properly ballasted and free from rotten and defective cross-ties which would be dangerous to its employees in walking along same, and that as a proximate result of such failure on the part of the defendant to use reasonable and ordinary care the tie broke, and the plaintiff's foot was thereby precipitated between the ties and he was thrown and the injury sustained as complained of, then I charge you that the defendant is guilty of negligence and you should answer the first issue "Yes."

But, if you do not so find, it would be your duty to answer the first issue "No."

If you answer the first issue "Yes," then you will consider the second issue, which is, "Was the plaintiff injured by his own negligence, as alleged in the answer?"

The burden of proof upon this issue is upon the defendant.

Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometime defined as a failure to use such care for his own safety as ordinarily prudent employees in similar circumstances would use.

I charge you that if the defendant in this case has satisfied you by the greater weight of the evidence that the plaintiff sustained the injury complained of on account of the failure upon his part to use such care for his safety as an ordinarily prudent employee in similar circumstances would have used, then he would be guilty of contributory negligence and you should answer this issue "Yes."

But if the defendant has not so satisfied you by the greater weight of the evidence, it will be your duty to answer the issue "No."

If you answer the first issue "Yes," then whatever your answer to the second issue may be, you will consider and answer the
82 third issue, which is, "Did the plaintiff assume the risk and danger incident to the employment, as alleged in the answer?"

In considering this issue, I charge you that some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normal and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and the workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not, but risks of another sort not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair, and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

The burden of this issue is also upon the defendant and if it has satisfied you by the greater weight of the evidence that the defect in its track and tie, if any, was known or personally observable by the plaintiff, then in contemplation of law he would have assumed the risk of walking upon said tie and track, and if injured thereby would have assumed the risk and would not be entitled to recover, and it would be your duty upon so finding to answer this issue "Yes."

But if the defendant has not so satisfied you by the greater weight of the evidence, you should answer this issue "No."

If you answer the third issue "yes" that ends the case, and you need not answer the fourth issue, because if you answer the third issue "yes" the plaintiff is not entitled to recover.

If you answer the first issue "yes" and the second issue "yes" and the third issue "no," or if you answer the first issue "yes" and the second issue "no" and the third "no" then you will proceed to

answer the fourth issue, which is in regard to the amount of damages which the plaintiff is entitled to recover.

83 If you answer the first issue "yes" and the second issue "no" and the third issue "no," that is, if you find from the greater weight of the evidence that the defendant was negligent and that its negligence was the proximate cause of the injury to plaintiff, and that the plaintiff was not guilty of contributory negligence, and did not assume the risk, then the Court instructs you that the plaintiff will be entitled to recover of the defendant, damages for past and prospective losses resulting from defendant's wrongful and negligent act, and this may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental and physical labor, or capacity to earn money, and for actual suffering of body or mind which are the immediate and necessary consequences of the injury, but in this case, as the plaintiff has not offered evidence to show what he paid for nursing and medical attention you will not consider that as an element for which he is entitled to damages, but you will consider the value of his loss of time, if any, and also the value of his loss, if any, from inability to perform mental and physical labor, or of capacity to earn money, if any, and for actual suffering of body and mind, if any, which are the immediate and necessary consequences of the injury.

If you answer the first issue "yes" and the second issue "yes" and the third issue "no," the measure of damages to which the plaintiff will be entitled, if any, will be measured by a different rule than what I have just given you, for by answering the second issue "yes," you will be ascertaining that the plaintiff by his own negligence contributed to his injury, and while the negligence on the part of the plaintiff, that is, contributory negligence, is not a bar to a recovery in this action on the part of the plaintiff, still the law is that the damages of the plaintiff shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff, and if you find that the plaintiff was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto, for the reason that the act of Congress under which

84 this action is brought provides that damages shall be diminished in proportion to the amount of negligence attributable to the employee.

But if you do not find that the plaintiff was guilty of contributory negligence, then the damages to which he would be entitled, if any, is as heretofore stated.

If you find from the greater weight of the evidence the burden being on the plaintiff, that he has been permanently injured, as a result of the negligence of the defendant, and further find that he is entitled to recover damages, he would be entitled to recover the present net value of the difference between what he would have earned and what he has been able to earn in his present condition, to be diminished in proportion to his contributory negligence, should you find that he was guilty of contributory negligence.

In addition to the charge that I have given you, at the request of

the defendant I give you the following additional special instructions:

"3d. Contributory negligence is the failure of the plaintiff to exercise due care for his own safety, and if the jury find from the evidence that the plaintiff, by the exercise of the care and caution of a prudent man under the circumstances could have seen that the cross-tie was defective, or the vacant place between the ties, and avoided stepping upon the tie or slipping into the vacant place, and failed to do so, then this would be contributory negligence on his part, and the jury should answer the second issue "Yes."

"4th. If the jury find from the evidence that there was a walk way on either side of the track which the plaintiff might have used in doing his work, without stepping upon the ties or ballast, and that the plaintiff voluntarily chose to walk upon the track instead of on the walkway, and that the plaintiff knew or by the exercise of reasonable care ought to have known that there was a defective cross-tie or uneven place in the ballast, then this was contributory negligence, and the jury should answer the second issue "Yes."

85 "5th. Some employments are necessarily fraught with danger to the workman, danger that must be and is confronted in the line of duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and the workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. The plaintiff being a civil engineer engaged in surveying and laying railroad tracks, assumed all the risks incident to such employment."

Gentlemen, do you want the stenographer's notes of the evidence read?

You may retire, gentlemen of the jury, and make up your verdict. After having retired, the jury returned for further instruction.

The Court: What is it you want to know?

Juror: We just wanted to get a mortality table, if it is possible to get it.

The Court: Yes, the evidence tends to show that he was 36 years old. The expectation, according to the mortuary table, is 31 1-10 years. That is evidence of a man's expectancy, made so by statute, but it is not conclusive on the jury. You may take into consideration his health, and the occupation he is engaged in, his habits, etc., anything that bears upon his life expectancy, and consider the mortuary table too, but you are not bound by the mortuary table, and it is for you to find from the evidence what his real expectancy is.

Assignments of Errors.

First Assignment of Error.

The admission of his Honor of the following questions and answers:

Q. You stated to Mr. Wilson that in this Reedy Fork accident,

which I think accur-ed about five years ago——

A. Six years ago, I think.

86 Q. That you were hurt all over, as you express it, what did the Southern Railway Company do to you at Reedy Fork?

A. They were running along on the main line going at 60 miles an hour, just before taking the curve at the trestle a rail broke under the weight of the engine and the car I was in, and several other cars, flew off the trestle and flew through the air and landed in the river, fortunately.

Q. What occurred to you?

A. The car turned in the air. I was in bed and was thrown across on the other side of the car which landed in the river. I was thrown under the water and pinned down on my back, and I had this sensation of drowning and my first thought was that I was going to drown, but I managed to wiggle from under the seat pinning me down and stood up, and I stayed in the water for two and one-half hours, stood there in cold water and finally the relief train came and they took me out of the car and put me under the trestle, or wherever it was they had a fire.

Q. As a result of the injuries received there in this occurrence you settled with the Southern Railway Co. for \$2,500.

A. That was one of the considerations.

Q. Please state to his Honor and the jury the entire consideration of that settlement?

A. There was a verbal promise from Mr. Dooley that I would never have to worry about a job as long as I lived after that, and the consideration of \$2,500 in addition to that.

Being defendant's first exception.

Second Assignment of Error.

The refusal of the Court to grant the motion for judgment of nonsuit at the close of the plaintiff's evidence as set forth in defendant's second exception.

Second Assignment of Error.

The refusal of his Honor to sustain the objection to the following question and answer:

87 Q. If the jury should find that after the Southern Railway Company employed him as a civil engineer and for one and a half or two years he climbed over hills and rotten cross-ties, unbalanced roads and hills, and did so with ease and without limping, and walked long distances and fast to catch trains, and did not limp or show any inconvenience or suffering from it, would you say that he was suffering now from an injury from slipping his knee in a football game as a boy? His present condition would not come from his knee cap slipping from playing football as a boy?

A. Considering the conditions you describe he was able to, I would say he had practically a normal knee joint.

Being defendant's third exception.

Fourth Assignment of Error.

The refusal of his Honor to grant the motion for judgment of nonsuit at the close of all the testimony as set forth in defendant's fourth exception.

Fifth Assignment of Error.

The refusal of his Honor to give the instruction prayed by the defendant as follows:

"The defendant did not owe to the plaintiff, a civil engineer engaged in surveying the location of a sidetrack, the duty to provide a reasonably safe walkway between the track of its main line for his use in checking up the stations. The purpose of the track being for the operation of trains and there being no evidence that the track where the plaintiff was injured was not safe for the operation of trains, then there was no breach of duty on the part of the defendant, and the jury should answer the first issue "No."

As set forth in defendant's fifth exception.

Sixth Assignment of Error.

The refusal of his Honor to give the instruction prayed by the defendant as follows:

"The defendant did not owe the plaintiff the duty to have sound crossties in its track or to have the spaces between the ties filled with ballast or cinders, the purpose of the ties and the ballast being
88 to furnish a secure and firm roadbed and track for the operation of trains, and if the jury find from the evidence that there was an unsound tie and one vacant place between the ties not filled with cinders, and that neither of these conditions made the track insecure or unsafe in the operation of the trains, then the jury should answer the first issue "No."

As set forth in defendant's sixth exception.

Seventh Assignment of Error.

The refusal of his Honor to give the instruction prayed by the defendant as follows:

"It was the duty of the defendant to keep and maintain its tracks, including crossties and ballast, in a reasonably safe and suitable condition for the purpose for which it was intended—that is, the operation of trains, and if the track, crossties and ballast at the place where the plaintiff was injured were safe and suitable for the operation of trains, then the defendant had discharged its legal duty and obligation. All risks and dangers that occur after a master has discharged his legal duty are assumed by the servant as ordinary risks incident to his employment, and if the jury find from the evidence that the injury to the plaintiff was caused by a defective tie or lack of ballast which did not render the track unsafe

or unsuitable for the operation of trains, then this was a risk assumed by the plaintiff, and the jury should answer the third issue "Yes."
As set forth in defendant's seventh exception.

Eighth Assignment of Error.

The refusal of his Honor to give the instruction prayed by the defendant as follows:

"If the jury find from the evidence that as a civil engineer in the railroad service it was a part of the plaintiff's duty to walk along and over tracks that are rough and uneven as well as tracks that are smooth and level, upon tracks that are unballasted as well as tracks that are ballasted, to walk over old, worn, and defective tracks as well as new and recently repaired tracks, then the risk arising from rotten or defective crossties and track not properly ballasted were risks assumed by him, and even if the jury find from the evidence that he was injured by stepping on an unsound crosstie and slipping into the unballasted space between the ties, this was a risk assumed by him, and the jury should answer the third issue "Yes."

As set forth in defendant's eighth exception.

Ninth Assignment of Error.

The giving by his Honor of the mortuary table to the jury upon their return for instructions, and the charge by the Court to them in respect thereto, as follows:

Q. What is it you want to know?

A. We just wanted to get a mortality table if it is possible to get it.

The Court then said: "Yes, the evidence tends to show that he was 36 years old. The expectation, according to the mortuary table is 31-1-10 years. That is evidence of a man's expectancy made so by statute, but it is not conclusive on the jury. You may take into consideration his health and the occupation he is engaged in, his habits, etc., anything that bears upon his life expectancy, and consider the mortuary table too, but you are not bound by the mortuary table, and it is for you to find from the evidence what his real expectancy is."

Being defendant's ninth exception.

WILSON & FERGUSON,
Attorneys for Defendant.

Undertaking on Appeal.

NORTH CAROLINA,
Guilford County:

In the Superior Court.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

Whereas, at April Term, 1915, of the Superior Court of Guilford County a judgment was rendered in the above entitled cause in favor of the plaintiff and against the defendant; and

90 Whereas, the defendant, Southern Railway Company, has
appealed from said judgment to the Supreme Court of North Carolina;

Now, therefore, we, the Southern Railway Company, defendant, and the Ætna Accident & Liability Company of Hartford, Conn., surety, undertake, pursuant to the statute, in the sum of fifty (\$50) dollars to pay all costs which may be awarded against said defendant, Southern Railway Company, on said appeal.

SOUTHERN RAILWAY CO., [SEAL.]

By WILSON & FERGUSON, *Attorneys.*

[SEAL.] THE ÆTNA ACCIDENT & LIABILITY CO.,

By THOMAS S. BEALL, *Res. Vice-President.*

[SEAL.] THE ÆTNA ACCIDENT & LIABILITY CO.,

By FRED C. ODELL, *Res. Ass't Secretary.*

Approved:

M. W. GANT,

Clerk Superior Court.

Filed August 20, 1915. M. W. Gant, Clerk Superior Court.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
Guilford County:

I, M. W. Gant, Clerk of the Superior Court in and for the county and State aforesaid, do hereby certify the foregoing and attached to be a true and correct transcript of the record in the case of "Philip Nelson v. Southern Railway Company," the same having been taken from and compared with the original as appears of record in this office.

In testimony whereof, I have hereunto set my hand and seal of said Court.

Done in office at Greensboro, N. C., this the 19th day of August, A. D. 1915.

[OFFICIAL SEAL.]

M. W. GANT,
Clerk Superior Court of Guilford County.

91

Docket Entries.

Appeal docketed August 21st, 1915; Argued November 2, 1915.
Opinion by Brown, J., filed November 24th, as follows:

92

No. 363.

PHILIP NELSON

vs.

SOUTHERN RAILWAY CO.

This is a civil action, tried April Term, 1915, Superior Court of Guilford County, Lyon Judge, upon these issues:

1st. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer. "Yes."

2nd. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

Answer. No.

3rd. Did the plaintiff assume the dangers and risks, as alleged in the answer?

Answer. No.

4th. What damages, if any, is plaintiff entitled to recover?

Answer. (\$6,500.00) Six Thousand, Five Hundred and no/100 dollars.

From the judgment rendered, the defendant appealed.

Brooks, Sapp & Williams, for the plaintiff.

Wilson & Ferguson, for the defendant.

BROWN, J.:

On the 26th of June, 1914, the plaintiff being at that time a civil engineer for the defendant went to Keysville, Virginia, to make surveys for a side track. The superintendent met him there and showed him where the track was to be located. The plaintiff then went to work on his survey. He went over the track and marked stations on the rails 100 feet apart, and then located the side tracks and took some levels. After this was finished, he walked back
93 over the track to check the stations. He testified that about three or half-past three in the afternoon he was walking along the track between the rails checking these stations with his note-book. After passing station 21, he stepped upon a cross-tie from which a small piece 1½ inches by 6 inches "V" shaped, shivered off under his weight. His foot slipped down between the ties into a space about

five or six inches deep from the top of the tie to the ballast. He stumbled, fell and dislocated his knee cap.

The principle of law upon which plaintiff rests his case is that defendant owed him a duty to provide him a reasonably safe place to do his work. The plaintiff admits that he could have done his work by walking outside of the track on the ground as well as between the rails on the ties, and that the track was in perfectly safe condition for the operation of trains and for all purposes for which a railroad track is intended.

From the circumstances in evidence, we are unanimously of the opinion that the injury inflicted on plaintiff was an accident, pure and simple, an unexpected and unforeseen result of a known cause, which ordinary foresight and precaution by defendant could not guard against.

As was remarked in the consideration of this case, the injury was as much the result of an accident as the Hammer case, (128 N. C., 264) or any other cases involving accidental injuries brought before us. To hold otherwise would make the defendant an insurer against all possible injury and the master is not an insurer of the servant's safety.

All that can be required of the master is that he shall use due and reasonable diligence in providing safe and sound machinery, in providing a safe place, and in the selection of fellow servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment.

Labatt's Master and Servant, 2nd Ed. Vol. 3, Sec. 919.

94 Neal vs. Brown, 150 N. C., 535.

The case of Railway vs. Reynolds, 20 S. E. Rep. page 70 is on all fours with this. In that case a conductor had gone back on the track for some necessary purpose, after stopping his train. He walked across a trestle and stepped on a cross-tie on the top of which was a small bit of decayed sap, "V" shaped and seven inches long, which under the pressure of his foot shivered off, causing him to fall and sustain serious injury. The Court said, "The real and immediate cause of this accident was the slipping of his foot upon the cross-tie because of the giving way of the little piece of decayed sap upon its edge."

Again the Court proceeds to say: "It did not appear that this cross-tie was not otherwise sound and in all respects sufficient and suitable for the use for which it was intended. It certainly was not the purpose of the company, in having ties, to make a way for employees to walk upon, but to make a safe roadbed for the running of its trains. The simple truth is that the injury the plaintiff received was a mere casualty incident to the ordinary risks of which he assumed in accepting him employment. This seems too plain for argument. Accidents will happen, not only in the best regulated families, but upon the best regulated railways as well, and to allow the recovery to stand in the present case, would be holding the company liable for the consequences of a mere accident for which it is in no fair view responsible."

Other cases supporting this view are

Ry. vs. Rieden, 107 S. W. Rep., 665;

Kerrigan vs. Ry., 194 Pa. St., 98.

To require of a railroad company to discover every little "doty place" in every one of its thousands of cross ties in order that its employees of every class may walk with absolute safety on them would demand of it a degree of care and diligence almost beyond human endeavor. We are of opinion that the motion to non suit should be granted. It is so ordered. Reversed.

[Endorsed:] Nelson v. Railway.

95 Supreme Court of North Carolina, August Term, 1915.

No. 363.

PHILIP NELSON

v.

SOUTHERN RAILWAY COMPANY.

Guilford County.

This cause came on to be argued upon the transcript of the record from the Superior Court of Guilford County:

Upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of said Superior court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable George H. Brown, Justice, be certified to the said Superior Court, to the intent that the judgment be reversed. And it is considered and adjudged further, that the plaintiff Philip Nelson, and surety to prosecution bond, Aetna Accident & Liability Company, F. P. Hobgood resident vice-president do pay the costs of the appeal in this Court incurred, to wit, the sum of Seventy-three 30/100 dollars (\$73.30), and execution issue therefor.

96 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the transcript of appeal in the case lately pending in this Court entitled, Philip Nelson v. Southern Railway Company, as appears by original record on file in this Court.

Witness my hand and seal of said Court at office this 17th day of March 1916.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 25,193. North Carolina Supreme Court. Term No. 418. Philip Nelson, plaintiff in error, vs. Southern Railway Company. Filed March 23d, 1916. File No. 25,193.

Office Supreme Court, U. S.
FILED

NOV 3 1917

JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 129.

PHILIP NELSON, PLAINTIFF IN ERROR,

vs.

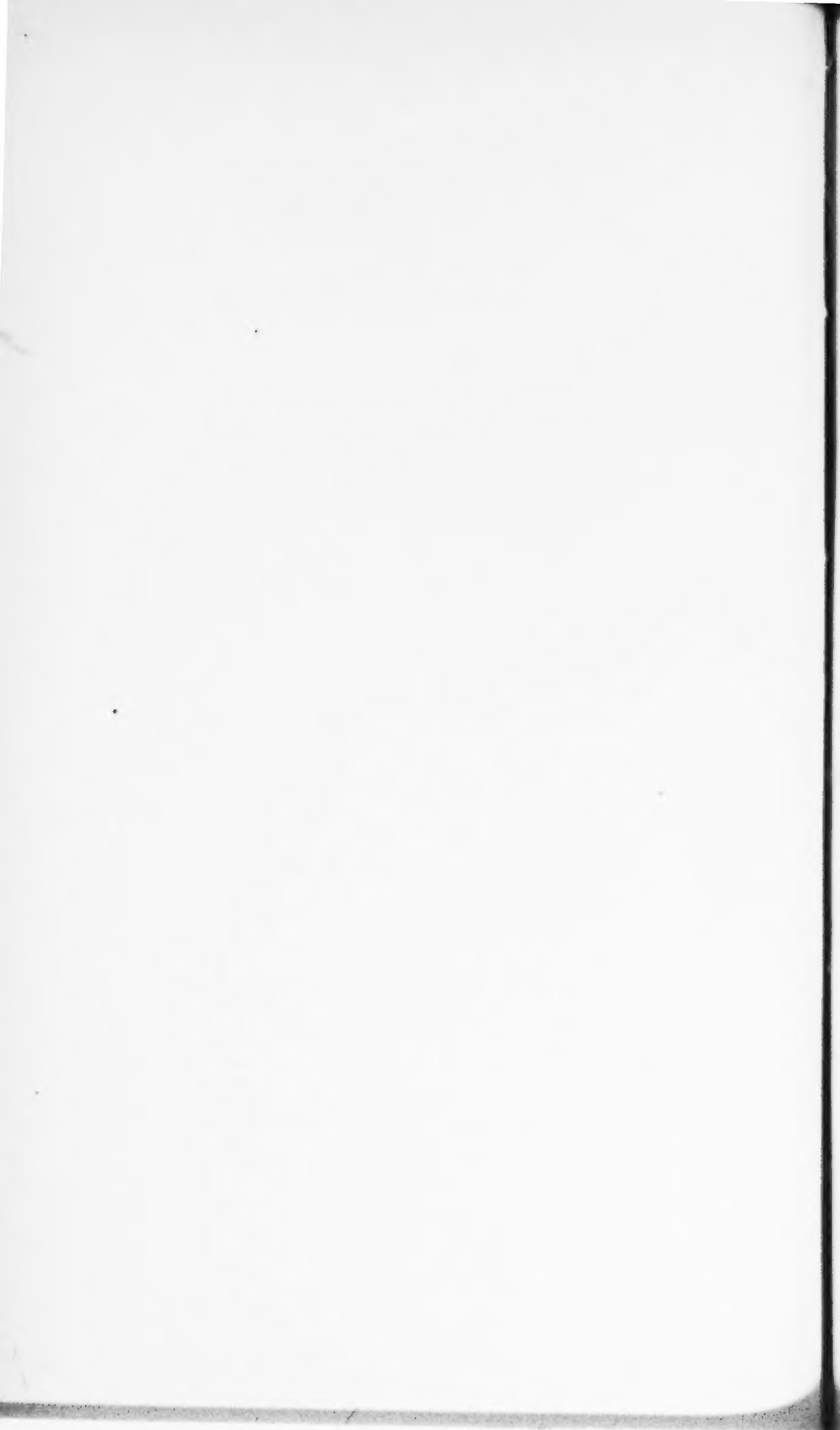
SOUTHERN RAILWAY COMPANY.

BRIEF OF PLAINTIFF IN ERROR.

A. L. BROOKS,
O. L. SAPP,
S. CLAY WILLIAMS,
R. C. KELLY,
C. L. SHUPING,

Attorneys for Plaintiff in Error.

(25,193)



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 129.

PHILIP NELSON, PLAINTIFF IN ERROR,

vs.

SOUTHERN RAILWAY COMPANY.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Facts.

Philip Nelson was a civil engineer, employed by the defendant in error. On the 26th day of June, 1914, he was directed by defendant in error to go from Richmond, Virginia, where he was then stationed, to Keysville, Virginia, on a rush order and make survey for certain proposed side-tracks in the railroad yards at Keysville. While engaged in making this survey and walking between the rails on the main line of the railroad within about 100 yards of the railroad station he stepped upon a cross-tie, and on account of its rotten and defective condition his foot was precipitated

down between the ties, which were unballasted, and he was thrown to the ground, seriously injuring his knee and rendering him unfit and unable for future service as a civil engineer.

This was a rush order. Plaintiff in error was instructed to make a survey for sidings that would be needed, and which would be pointed out to him by the superintendent, and finish the work in one day and get the map and estimate out the next day. When the superintendent had finished showing him the additional tracks that would be needed it was about 11 o'clock, and it was necessary for him to complete the survey between that time and night. The survey embraced about 6,800 feet of track.

It was customary and necessary for plaintiff in error to walk on the ties between the rails in order that he might make the proper marks on the rails, indicating the various stations, which were to be afterwards compared and checked with his note book.

The tie upon which plaintiff in error stepped, and the defective condition of which caused the injury, was an oak tie. An oak tie rots from the inside. The defendant in error had a method of ascertaining whether or not a tie of this character was sound, to wit, by knocking on it with an iron bar. The tie in question furthermore was not a standard tie, as prescribed by the printed rules and regulations of the defendant in error with respect to its width and length. According to the regulations set forth in the rule book of defendant in error with respect to ballast, the ballast was supposed to fill up a space in the center of the track between the ties, and to the top thereof, and extend beyond the end of the ties for something like two or two and a half feet.

At the point where plaintiff in error was injured the track was unballasted to a depth of five or six inches from the top of the tie.

Specification of Errors.

First. The Supreme Court of North Carolina erred in holding and deciding that the trial judge committed error in declining and overruling the motion of the defendant, the Southern Railway Company, made at the close of the plaintiff's testimony, and renewed at the close of all the testimony to dismiss the case as upon non-suit.

Second. The Supreme Court of North Carolina erred in holding and deciding as a matter of law that under the Federal Employers' Liability Act the record presented no evidence tending to show negligence on the part of the defendant sufficient to authorize the trial judge to submit the question of negligence to the jury.

Third. The Supreme Court of North Carolina erred in signing the judgment which appears in the record as the judgment of that court.

ARGUMENT.

The sole question presented by plaintiff's assignments of error is whether or not there was evidence sufficient to justify the submission of this case to the jury upon the question of the negligence of defendant in error in causing the injury complained of. In the determination of this question it is important to consider:

First. The Place of the Injury.

The plaintiff was injured on the main line of defendant in error, and on its railway yard only 100 yards from its railway station in Keysville, which was used by the employees of the company at will, and with the knowledge of

defendant in error, as a walkway in passing up and down the track in the discharge of their duties to the company.

Second. The Duty of Defendant in Error with Respect to the Place of the Injury.

It was the duty of the defendant in error to maintain its track in a reasonably safe condition at this point with regard to the nature and character of work required to be performed by its employees at that place. It is common knowledge that railway companies shift and rearrange their trains in their railway yards, and in performing this duty it is necessary for their employees to mount and dismount from their engines and cars while in motion, so that a defective car or an unballasted track at such a place would make it unsafe and, indeed, highly perilous for this work to be performed.

Third. The Circumstances of the Injury.

The plaintiff in error was walking between the rails at the time of his injury. It was necessary and customary for him to walk at this place in order to perform the work in which he was engaged. He had a right to presume that the defendant in error had performed its plain duty. He was filling a rush order. It was necessary that he perform his work with the least possible delay. He stepped upon a tie which appeared to him to be in good condition, but which, as a matter of fact, was in a rotten and defective condition. This condition was known to the defendant in error, or could have been known by the exercise of reasonable care, because it had adopted a method for ascertaining when a tie became defective. When plaintiff in error stepped upon this tie and it crumbled beneath his foot it caused his foot to precipitate down five or six inches between the ties on account of the lack of proper ballast.

There are two cases in which this court has upheld re-

coveries in action brought under the Employers' Liability Act, which we think bear a striking similarity to the facts in this case. The first is *Southern Railway Company vs. Renn*, 60 U. S., L. E. 1006, 170 N. C., 128. An examination of the facts in this case will disclose that the plaintiff sustained an injury while walking to the pump house of the defendant in error along one of the several paths leading thereto by stepping upon ice which was covered with snow, and slipping thereon. The ice had been formed by reason of the tank of the defendant in error being allowed to overflow. The other case is *Southern Railway vs. Puckett*, 37 Supreme Court Reporter, 703 (decided June 11, 1917), in which case plaintiff was injured by stumbling over certain large clinkers which were on the road-way near the track, and in stumbling struck his foot against some old cross-ties overgrown with grass.

There are a number of cases from different States holding that it is negligence for a railroad company to fail to keep its track in proper condition and allowing rotten cross-ties to exist without ballast. For the information of the court we cite a few of such cases below.

In *Missouri Pacific Railway Co. vs. Jones*, 16 Amer. State Reports, 879, it is said that "it is negligence in a railway company to leave holes between the cross-ties on its track, and a car coupler in its employ, who is injured while the track is in such condition, without negligence on his part, may recover, and if the evidence as to his contributory negligence in the matter is conflicting, the question of negligence should be submitted to the jury."

In the case of *Illinois Central Railroad Co. vs. Cosby*, 50 N. E., 1011, it appeared that a switchman in obedience to orders of his superior, tried to uncouple cars, but being unable to pull the pin, walked alongside of the moving cars, according to the custom, until his foot was caught between two ties, and he was killed. He was an intelligent, careful, temperate young man, who had had considerable experience

in railroading. *Held*, that the question whether he used ordinary care was for the jury, and held further, that evidence that a switchman was killed at a point where the space between the ties was not filled, and that his foot was found on the inside of the rail, with the toe down, warrants the jury in finding that the unfilled condition of the track was the proximate cause of the accident.

In *Chicago, R. I. & P. Co. vs. Kinnare*, 60 N. E., 57, it is held that the fact that a railroad company permits piles of sand and gravel to remain along the side of its track, at a place where it sends special policemen in its employ to arrest men trespassing on trains, and over which he stumbles and falls under the wheels of the cars and is killed while in the discharge of his duty while attempting to board a moving train for the purpose of making arrests, may reasonably be found by the jury to be negligence and the proximate cause of his death.

In *Gulf C. & S. F. R. Co. vs. Boyle*, 87 S. W., 395, it is said:

"An employee of a railroad company, whose place to work is on its tracks, may assume that the railroad has exercised ordinary care to make the track a reasonably safe place for him to do his work; and unless he knows that this duty has not been discharged, and the danger is incident to the failure to discharge the same, he assumed no risk arising from such failure."

"A railroad company was reasonably bound to anticipate that a narrow strip of rough and unballasted track with isolated holes therein, left in a track generally ballasted, in a place where switchmen work, might probably cause injury to an employee by stepping into a hole in an unballasted track."

Chicago & Eastern Ry. Co. vs. Dinius, 103 N. E., 652.

"An instruction is not erroneous which charges that it is the duty of the railroad company to exercise greater care to keep the space between ties filled, and the ground level, in large switch yards, where

trains are made up and much switching done, than would be required in yards where there is less occasion to make couplings."

Choctaw, O. & G. Ry. vs. Tenn., 53 C. C. A., 497.

"It is the duty of railroad companies to keep all portions of their track in such repair and so watched and tended as to insure the safety of all who may be lawfully upon the track, whether passengers, servants, or others. If they fail to do so, they will be liable for the consequences."

Lewis vs. St. Louis & Iron Mt. Ry. Co., 59 Mo., 495; 21 Amer. Reports, 385.

"It is the duty of a railroad company to exercise reasonable care to keep its tracks in safe condition for its employees to work upon."

Donnahue vs. Boston & Maine Railroad, 178 Mass., 251; 59 N. E., 663.

Recoveries were also upheld in the following cases:

Plaintiff, a train porter, was injured while trying to board the train, by reason of a cross-tie which extended three feet longer beyond the rail than the ordinary tie, and which was unballasted to a depth of six inches.

Sanders vs. A. C. L. R. R., 160 N. C., 526.

Plaintiff, a conductor, was injured while attempting to couple cars, by reason of his foot becoming fastened under the rail on account of improper ballast, the court holding that it was the duty of the railroad company to so ballast its track at all switching points that the ballast between the rails will be on a level with the top of the tie, so that no opening will be left under the rail.

Lake Erie & Western Railroad Co. vs. Morrissey, 5 A. N. R., 120; 52 N. E., 299; 75 Ill. App., 436.

Plaintiff, a yard conductor, was injured while coupling

cars in a railway yard by being thrown on track on account of his foot coming in contact with a defective tie.

Pa. Co. vs. Brush, Adm'x., 130 Ind., 347; 14 A. N. C., 558; 28 N. E., 615.

Plaintiff, a brakeman, engaged in coupling cars at night, was injured by stepping on stones in the railroad yard, which caused him to fall and be run over.

Fish, Adm'x., vs. Ill. Cen. Ry. Co., 96 Iowa, 702; 14 A. N. C., 666; 65 N. W., 995.

Plaintiff, a brakeman, was injured while coupling cars in the railroad yard, caused by slipping on ice formed in the yard by reason of a leak in a water tank.

McFall vs. Iowa Cen. Ry. Co., 96 Iowa, 723; 14 A. N. C., 666; 65 N. W., 321.

Plaintiff, a brakeman, was injured while in the performance of his duties by stepping on the end of a loose board of some wooden boxing which protected the switches.

Sweat vs. Boston & Albany R. R. Co., 156 Mass., 284; 15 A. N. C., 486; 31 N. E., 296.

Plaintiff, a brakeman, was injured on the railroad yard while attempting to uncouple cars, by reason of his slipping into a hole in the road bed and his foot becoming caught therein.

Hannah vs. Conn. River R. R. Co., 154 Mass., 529; 15 A. N. C., 488; 28 N. E., 682.

Plaintiff, a brakeman, was injured while coupling cars, on account of his foot catching in a hole under a switch rod, causing him to be knocked down and run over by the cars.

Vautrain vs. St. L., I. M. and Sou., 78 Mo., 44; 16 A. N. C., 492.

Plaintiff, a brakeman, was injured while coupling cars, by reason of the failure of the railroad company to properly ballast its track.

57 Ark., 377, St. L., I. M. & Sou. Ry. *vs.* Robbins,
13 A. N. C., 216 · 21 S. W., 886.

**Rule of the Supreme Court of North Carolina with Respect
to a Judgment of Nonsuit.**

It is an established rule of the Supreme Court of North Carolina in passing on a motion for judgment as of nonsuit to consider only the evidence most favorable to the plaintiff and in the most favorable aspect to him.

Lloyd *vs.* Southern Ry. Co., 166 N. C., 23.

Shaw *vs.* North Carolina Public Service Corp., 168
N. C., 611.

Johnson *vs.* Seaboard Air Line Ry. Co., 163 N. C.,
431.

Lewis *vs.* Norfolk Southern Ry. Co., 163 N. C., 33.

Assumption of Risk.

The court's attention is called to the fact that the Supreme Court of North Carolina did not discuss the question of assumption of risk, but inasmuch as defendant relied upon this contention in its brief, we deem it proper to set forth briefly our position with regard thereto.

We understand the rule of this court in construing the Federal Employers' Liability Act with respect to the defense of assumption of risk to be, that it is not the duty of an employee to exercise care to discover extraordinary danger that may arise from the negligence of the employer, or those for whose conduct the employer is responsible, but that the employee may assume that the employer has exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are

so obvious that an ordinarily careful person under the circumstances would observe and appreciate them.

Chicago and Northwestern Railway Co. *vs.* William Bower, 60 U. S., L. E., 1107.

Chesapeake and Ohio Ry. Co. *vs.* John J. De Atley, 60 U. S., L. E., 1016.

Central Vermont Ry. Co. *vs.* White, 59 U. S., L. E., 1433.

Gila Valley, Globe and Northern Ry. Co. *vs.* John Hall, 58 U. S., L. E., 521.

Seaboard Air Line Ry. Co. *vs.* Horton, 58 U. S., L. E., 1062.

It is uncontroverted that the defect in the cross-tie was a latent one. The defendant was negligent in allowing the tie to remain at the place of injury, and therefore the injury having been caused by a latent defect due to the master's negligence, the defense of assumption of risk under the above-stated rule would not be available to the defendant in error.

As bearing upon the question of defendant's negligence, the court's attention is called to the fact that the defendant in error in its answer expressly pleaded assumption of risk, which it specified to be in the plaintiff's walking upon the middle of the track. Of course there could be no assumption of risk unless a danger actually existed. This is precisely what the plaintiff in error contends; that the track upon which he was hurt was located within the yards at Keyesville, Va.; that with the knowledge of the company it was used by employees walking to and fro; that it was improperly ballasted; that it had defective ties in it, and there was evidence on the part of the plaintiff in error tending to establish all of these facts.

We respectfully submit that the facts in this case bring the plaintiff in error within the provisions of the Employers' Liability Act, and that it was never contemplated by

Congress that it should be so technically interpreted as to exclude an obviously meritorious recovery as was had at the trial in this case.

Respectfully submitted,

A. L. BROOKS,
O. L. SAPP,
S. CLAY WILLIAMS,
R. C. KELLY,
C. L. SHUPING,

Attorneys for Plaintiff in Error.

(35545)



INDEX.

	Page.
1. Statement of the case.....	1
2. Sole question presented by plaintiff is whether there was negligence or not.....	4
3. Defendant was not negligent.....	4
4. Plaintiff assumed the risk.....	20
5. The defendant could not have reasonably foreseen the accident	29
6. The case does not involve an interpretation of the Federal Act or definition of legal principle in its application.....	30
7. Discussion of authorities cited in brief of plaintiff in error.	31
8. Summary	32

TABLE OF CASES.

Baugham, Admr., <i>vs.</i> New York, etc., R. Co., 241 U. S., 237....	28
Central of Vermont Ry. Co. <i>vs.</i> White, 238 U. S., 307.....	27
Chesapeake & O. Ry. Co. <i>vs.</i> De Atley, 241 U. S., 310.....	26
Chicago & Northwestern R. R. Co. <i>vs.</i> Bower, 241 U. S., 470....	26
Choctaw, etc., R. Co. <i>vs.</i> McDade, 191 U. S., 64.....	10
East Tennessee, Virginia & Georgia R. Co. <i>vs.</i> Reynolds, 20 S. E., 70.....	18
Finnell <i>vs.</i> Delaware, &c., Co. (N. Y.), 29 N. E., 825.....	19
Gila Valley, etc., Ry. Co. <i>vs.</i> Hall, 232 U. S., 94.....	27, 28
Great Northern R. Co. <i>vs.</i> Knapp, 240 U. S., 464.....	11, 30, 32
Gregory <i>vs.</i> Oil Company, 169 N. C., 456.....	12, 13
Hammer Case, 128 N. C., 264.....	10
Hough <i>vs.</i> Texas, &c., R. Co., 100 U. S., 213.....	10
International & Great Northern R. R. Co. <i>vs.</i> Rieden, 107 S. W., 665	17
Jacobs <i>vs.</i> Southern Railway Co., 241 U. S., 229.....	27
Kerrigan <i>vs.</i> Pennsylvania R. R., 194 Pa., 98; 44 Atl., 1069....	16
Lading <i>vs.</i> Jefferson Ice Co., 141 Wis., 191; 124 N. W., 407....	25
Marks <i>vs.</i> Cotton Mills, 135 N. C., 287.....	12
Nail <i>vs.</i> Brown, 150 N. C., 535.....	10, 12
Seaboard Air Line R. Co. <i>vs.</i> Horton, 233 U. S., 492.....	9, 10, 25
Seaboard Air Line R. Co. <i>vs.</i> Koennecke, 239 U. S., 352, 355....	30
Seaboard Air Line R. Co. <i>vs.</i> Pagett, 236 U. S., 668; 59 L. E., 777	30

	Page
Seaboard Air Line R. Co. <i>vs.</i> Renn, 241 U. S., 290.....	31
Southern Ry. Co. <i>vs.</i> Gray, 241 U. S., 333.....	9
Southern Railway Co. <i>vs.</i> Nelson, 170 N. C., 170; 86 S. E., 1036.	10, 29
Southern Ry. Co. <i>vs.</i> Puckett, 244 U. S., 571.....	31
Washington & G. R. Co. <i>vs.</i> McDade, 135 U. S., 554.....	10, 13

NEW STATUTES TO

STATUTES.

Federal Employers' Liability Act (U. S. Comp. St. 1916, secs. 8657-8665)	9
--	---

TEXT BOOKS.

Labatt on Master and Servant:

Sec. 919	11, 12
Sec. 921	14
Sec. 1109	25
Sec. 1172	24

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 129.

PHILIP NELSON, PLAINTIFF IN ERROR,

vs.

**SOUTHERN RAILWAY COMPANY, DEFENDANT IN
ERROR.**

BRIEF OF DEFENDANT IN ERROR.

1. Statement of the Case.

This is a civil action begun in the Superior Court of Guilford County, North Carolina, to recover damages for personal injury sustained by the plaintiff in error, Philip Nelson (hereinafter called the plaintiff), which was alleged to have been caused by the negligence of the defendant in error, the Southern Railway Company (hereinafter called the defendant).

This action was brought under the Federal Employers' Liability Act, and it was specifically alleged that both the plaintiff and the defendant were engaged in interstate commerce at the time of the plaintiff's injury, and the specific negligent act set out in the complaint was that in the de-

defendant's track there was one defective cross-tie, and that between this tie and the next one there was one space between these ties so that the top of the cross-ties were five or six inches above the top of the ballast between the ties.

We quote the language of the plaintiff's brief:

"That while so walking down the track between the rails, one of the defendant's cross-ties upon which plaintiff stepped instantly broke and gave way under the weight of his step, thereby causing his foot to suddenly and violently slip down between this broken tie and the adjacent tie, causing great injury to the plaintiff, as hereinafter set out. That the said cross-tie was rotten and decayed in such a manner as to be dangerous to a person stepping thereon (printed Record, page 10).

* * * That defendant's track and roadbed at this point was further defective and in bad condition, as the defendant knew, in that it was not properly ballasted, leaving an open space between the ties, so that the top of the cross-ties were five or six inches above the top of the ballast between the ties (printed Record, page 10).

* * * Defendant was guilty of negligence in not removing said cross-tie from its line of railway aforesaid, and in not replacing the same with another cross-tie reasonably sound and safe; that defendant was guilty of negligence in permitting its track to be ballasted in such a way that the top of the cross-tie aforesaid was five or six inches above the top of the ballast" (Printed Record, page 11).

There is no other allegation of negligence in the complaint directed against the defendant in any other respect whatsoever.

The material facts disclosed by the evidence were as follows:

The plaintiff was a civil engineer in the employment of the defendant, and at the time of his injury had had eleven years' experience in that position. On the 26th of June, 1914, being at that time a civil engineer for the defendant,

with headquarters at Richmond, Virginia, he went to Keysville, Virginia, to make surveys for a side-track. The superintendent met him there, and showed him where the track was to be located. Plaintiff then went to work on his survey, it being about eleven o'clock in the forenoon. He went over the track and marked with chalk stations on the rails one hundred feet apart, and then located the sidetrack and took some levels. After this was finished he walked back over the track to check the stations (Printed Record, pp. 15 and 16). About three or half-past three in the afternoon he was walking along the track between the rails, checking these stations with his note-book in his left hand. This was the third time he had walked over this identical part of the track.

According to the plaintiff's own story the accident happened as follows:

"I had just passed station 21 when I stepped upon a tie which broke off with my weight upon it, and my foot slipped back and down between the ties and twisted it. * * * There was about five or six inches from the top of the tie to the bottom of the ballast in there at that particular point. * * * I examined the tie when it broke with me. The tie measured six inches on the west end and nine inches on the east end; in the center of the track it had a face of three and one-half inches from the center. I did not make the measurements at the time; I made the measurements three or four months afterwards. It measures three and one-half inches beginning six inches from the west rail to the center of the track, and then goes out to nine inches at the end of the tie. That is the face of the tie. The balance of the face had rotted away. The portion of the face (which broke off) is about two inches wide and I should say went from one and one-half inches in depth to nothing; it was in a "V" shape, and was about five or six inches long" (Printed Record, pp. 16 and 17).

2. Sole Question Presented by Plaintiff is Whether There Was Negligence or Not.

In the brief of the plaintiff in error, on page 3, three errors only are assigned, all of which relate only to the defendant's negligence. They are, first, that the Supreme Court of North Carolina erred in deciding that the defendant was entitled to a nonsuit; second, that the Supreme Court of North Carolina erred in holding that there was no negligence proven upon the part of defendant; and third, that the Supreme Court erred in signing the judgment directing that the suit should be dismissed. This is conceded by the plaintiff's attorneys in their brief, at page 3, where, immediately following the above specifications of errors, it is said:

"The sole question presented by plaintiff's assignments of error is whether or not there was evidence sufficient to justify the submission of this case to the jury upon the question of the negligence of defendant in error in causing the injury complained of."

However, later on in the brief, at pages 9 and 10, there is some discussion of the question of assumption of risk, and this will be briefly answered.

3. Defendant Was Not Negligent.

The track upon which the plaintiff was walking at the time he received the injury complained of is conceded by all witnesses to have been in excellent condition and safe for the operation of trains. The only charge against the condition of track is contained in the plaintiff's testimony, and this, it will be noted, is exclusively confined to the condition of one single cross-tie and to the condition of one single place between this tie and the next adjacent tie, where it is alleged there was insufficient ballast. This portion of defendant's track had been rebuilt, during the latter part of 1913 and a little more than six months prior to the injury, with good,

sound oak ties and was well ballasted, the surface of the track being practically level (printed Record, pp. 39, 42, and 45).

There is no conflict in the evidence that the track was in excellent condition.

G. S. Gaulding, yardmaster, testified as to this:

"On June 26, 1914, I know the condition of the track, the track had been in perfect condition at that time; it had been recently rebuilt and all the ties were good, sound ties and cinder ballast had been put in to fill the holes between the ties and it was all practically level; I have had occasion to examine it lately; I have daily. It is practically in the same condition now that it was in June, 1914; there has been no change in the cross-ties since that time. * * * The tie was located 300 or 350 feet north of the depot on the main line; the tie was a little under size; it is perfectly sound and will last for two years longer; the ballast now and has been on the walk is level with the exception of that particular tie is possibly an inch higher than the rest of the ties along that part of the walk. The rest of the ties are perfectly sound. I made an inspection and investigation to ascertain their condition by walking over the ties and examining them; I examined all the ties from the depot to the tank; the ballast in June, 1914, was filled in between the ties, even with the ties, making it a perfectly smooth walkway; the same condition exists now." (Printed Record, page 39.)

G. E. Wade, hotel proprietor, testified:

"I looked at each tie as I got to it from the tank back to the depot; they were all sound; there was not a rotten tie in that part of the track; the condition of the tie that Roberts showed me and the tie where Mr. Nelson was standing pointing with his friend, was a small tie, did not have much face, and sorter looked like the sap had rotted or worn off, it did not have any sap, but the heart of it was perfectly sound and whole; it was a white oak tie; I decided to see whether it was sound and tried to stick my knife into it and kicked it; it was whole. * * * With respect to the ballast

between the ties, that part of the track has always been ballasted good with cinders on account of the engines standing there and losing cinders; they even have to haul cinders away from there. There is no place between the ties 5 or 6 inches deep. There was not in June, 1914; it has always been ballasted good." (Printed Record, page 41.)

H. D. Peters, bank cashier, testified:

"In June, 1914, between the depot and the tank it was in as good condition as it is almost possible for the track to be. That is the alignment is good, the ties are all ballasted with cinder ballast, and it is all filled in between the ties almost level, that is, as level as you could speak of ground. * * * I made a minute examination of the ties between the depot and the tank; they were sound; the tie that was pointed out to me is possibly 6 inches or 6½ inches in width at the small end and about 9 inches at the opposite end. It is possibly raised anywhere from one-half to an inch above the others, that is by bearing up slightly in the center of the track; the filling around that tie is level with the rest and maybe three-quarters of an inch above the others and above the ballast at that point. The tie is sound; a white oak tie." (Printed Record, page 42.)

W. R. Staples, warehouseman, testified:

"I have been familiar with this track for 9 years. I went over it sometimes every day or two, and sometimes a week or ten days; I went over it more often in June, 1914, than any other time; I am in the fertilizer business and very often look for a car of fertilizer and have to walk up and down and walk where the cars are stored on the switches, and wagons and buggies, two or three carloads come in every spring. I observed the condition of the track just by walking over it; it was the best walkway, as I said, we had around there; I never noticed the ties particularly until this spring; I noticed them this spring. All the ties are sound from the depot to the tank; after I found out I was coming down here I thought I had better be in position to answer that question is the reason I examined them; I walked them over from

one end to the other, back and forth; I kicked them, the only examination I did make; their condition was sound; I observed the ballast; it has always been practically level; right in the middle of the track, of course, the cinders are always higher than they are next to the rail; most of the time there will be just enough space under the rails so the water could probably soak out, I think; in the middle of the track ever since I have been there it has always been level with the ties, or about that." (Printed Record, page 43.)

S. B. Ward, carpenter, testified:

"The condition of the ties were good and sound; the ballast was pretty good, good walking. Filled up between the ties, filled up level; I was there when Mr. Roberts pointed out the tie to me, pointed out a small tie down the road about 300 feet, something like that. The tie was an oak tie, a little smaller at one end than the other; white oak, big at one end and small at the other, tough, sound. I have observed the track lately, have gone over it, have made an inspection of it; the condition now between the depot and the tank is good; the ties are good; they are sound as any piece of track you can find anywhere. The ballast is good, good cinders and good walk." (Printed Record, page 45.)

W. E. Hailey, postmaster, testified:

"As far as I could tell by walking over the road it looked like a good piece of road to me, in fact it looked better than the average roadbed I am in the habit of walking on. The ties looked sound and good; the ballast was practically level with the ties and it was a good piece of track. There was no place in the track that was five or six inches where the ballast was out between the ties; I have gone over it lately; I think it was one day last week, I went over it a couple of times last week; it is in good condition. It is in good condition; it looks like good, sound ties, and it is level." (Printed Record, page 46.)

A. B. Hamner, merchant, testified:

"I did not notice particularly the ballast in June, 1914, but it has always been very well ballasted, the main line through there; it was ballasted with cinders; it was ballasted in between the rails with cinders all the way along from the depot to the tank; it come pretty near up on a level with the sills, I think. I made an examination lately; I walked over it and looked at the ties carefully to see whether or not they were sound; they all seemed to be sound to me." (Printed Record, page 47.)

J. H. Daniel, section foreman, testified:

"I came there in February, 1914; have been in charge there ever since up until the last of March; ever since I took charge the track has been all right; the ties are good; the track was good for ties and service and filling; the ties were sound; cinder ballast filled in about the level of the top of the ties; the walkway on either side of the track was good. I have gone over it lately to make an examination; I found it good; good for ties and service; ties were sound; the service of the line was good; the track was filled in with cinder ballast level with the top of the ties." (Printed Record, page 48.)

T. A. Spencer, section foreman, testified:

"In June, 1914, the condition was good; the ties were good and the service was good, and the line was good, and it was dressed uniformly to the top of the ties; the same condition exists now. I mean by 'dressed' finished up; filled in with cinders; that is what I call ballast." (Printed Record, page 48.)

There is not a scintilla of evidence in the record to contradict the testimony of this array of witnesses other than that of the plaintiff, and his testimony, as stated above, is directed against one single tie and one single hole between the ties, but the plaintiff himself even admitted that the

track was perfectly safe for train operation. (Printed Record, page 20.)

The Federal Employers' Liability Act, under which this action was brought and tried, provides that every common carrier engaged in interstate commerce shall be responsible to employees for "injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiencies due to its *negligence* in its cars, engines, appliances, machinery, track, roadbed, work boat, wharves, or other equipment." (Italics ours.)

As the words in italics indicate, the act provides that the common carrier shall be responsible only for negligence.

This court has expressly so declared in a number of cases. Thus, in *Southern R. R. Co. vs. Gray*, 241 U. S., 333, a case arising under the act, this court said:

"Negligence by the railroad company is essential to a recovery."

And again, in *Seaboard Air Line R. Co. vs. Horton*, 233 U. S., 492:

"It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. * * * To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence."

It is the well-settled rule in this court that a railroad company's duty to its employees is only to see that ordinary care and prudence is exercised to the end that the place in

which its work is to be performed is safe. It is not a guarantor of the safety of the place of work.

Seaboard Air Line R. Co. *vs.* Horton, 233 U. S., 492.

Choctaw, etc., R. Co. *vs.* McDade, 191 U. S., 64.

Washington & G. R. Co. *vs.* McDade, 135 U. S., 554.

Hough *vs.* Texas, etc., R. Co., 100 U. S., 213.

The Supreme Court of North Carolina, in passing on this question in the case at bar, well says:

"The principle of law upon which plaintiff rests his case is that defendant owed him a duty to provide him a reasonably safe place to do his work. The plaintiff admits that he could have done his work by walking outside of the track on the ground as well as between the rails on the ties, and that the track was in perfectly safe condition for the operation of trains and for all purposes for which a railroad track is intended.

"From the circumstances in evidence, we are unanimously of the opinion that the injury inflicted on plaintiff was an accident, pure and simple, an unexpected and unforeseen result of a known cause, which ordinary foresight and precaution by defendant could not guard against.

"As was remarked in the consideration of this case, the injury was as much the result of an accident as the Hammer case (128 N. C., 264), or any other cases involving accidental injuries brought before us. To hold otherwise would make the defendant an insurer against all possible injury and the master is not an insurer of the servant's safety.

"All that can be required of the master is that he shall use due and reasonable diligence in providing safe and sound machinery, in providing a safe place, and in the selection of fellow-servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment. Labatt's Master and Servant, 2d ed., vol. 3, sec. 919. Nail *vs.* Brown, 150 N. C., 533."

(Printed Record, p. 66.)

To reverse the judgment of the lower court in this case would be a departure from the well established and just rule of this court, not to disturb the decision of the State Supreme Court in a case of this kind unless to correct palpable error and injustice.

Great Northern R. Co. *vs.* Knapp, 240 U. S., 464.

The principle of law upon which the plaintiff relied, and still relies, to sustain the allegation of negligence is that the master owes to the servant the duty to use ordinary care in providing a reasonably safe place for him to do his work. In determining whether the defendant has used ordinary care in furnishing a reasonably safe place for the plaintiff to do his work, not only the character of the place and the purpose for which it is intended and used must be considered, but also the kind of servant who is injured, his ordinary duties and the particular work about which he is engaged.

"All that can be required of the master is that he should use due and reasonable diligence in providing safe and sound machinery and in the selection of fellow-servants of competent skill and prudence so as to make it reasonably probable that injury will not occur in the exercise of the employment."

Labatt on Master and Servant (2d ed., section 919).

"The master is not bound to see that his instrumentalities are 'absolutely safe,' or 'absolutely safe and suitable,' or 'perfectly safe.' Nor is he bound to see that 'in every event' his instrumentalities are in safe condition, nor to see that they are as safe 'as human skill and foresight can make them.' So far as there is any guaranty on his part, it is merely that due care shall be exercised in furnishing and maintaining the instrumentalities. This limitation upon the liability has been put upon the ground of public policy, the opinion being expressed that a contrary rule would eventually be disastrous to the servants themselves. But it is scarcely necessary to sustain the rule by involving *in terrorem* arguments based upon speculations in the field of political economy. It is

sufficiently supported by the consideration that ordinary care is expressive of the standard of duty which is owed by all members of the community to each other, and that the law exacts a higher standard only in a few cases, and for reasons which are wholly inapplicable to the relations between a master and his servant.

"In the cases cited in this section, the principle that a master is not an insurer of his servant's safety is treated as a deduction from the conception that he is bound to exercise neither more nor less than ordinary care."

Labatt on Master and Servant (2d ed.), sec. 919.

In the case of *Nail vs. Brown*, the Supreme Court of North Carolina, in discussing this principle, uses the following language:

"The employer does not insure the safety of his workmen. He does not contract expressly or impliedly to furnish them an absolutely safe place to work in, but is bound only to exercise reasonable care and prudence in providing such a place."

Nail vs. Brown, 150 N. C., p. 533.

In the case of *Marks vs. Cotton Mills* it is said:

"The employer does not guarantee the safety of his employees, he is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably safe and fit and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use."

Marks vs. Cotton Mills, 135 N. C., 287.

In *Gregory vs. Oil Company*, 169 N. C., 454, 456, in discussing the case in which an employee was injured by a bale

of cotton thrown upon the platform through a door and rebounding against him, the Supreme Court of North Carolina said:

"It is urged for the appellant that the duty of the master to provide his employee with a safe place to work is primary, absolute and nondelegable, and that, for a failure in this respect, the master was guilty of negligence, and on the testimony, the jury will find that there was concurrent negligence of the master and the employees who threw the bale on the platform. The position is sound in so far as it states the duty of the master to be primary and nondelegable; but it is not absolute, in the sense that an employer of labor is an insurer of the safety of his laborers. He is held to the exercise of proper care in providing a safe place to work and this, as a general rule, is the measure of his obligation."

Gregory vs. Oil Co., 169 N. C., 456.

Washington & Georgetown R. R. Co. vs. McDade, 135 U. S., 554; L. E., 235, 241.

It appears from the testimony of all the witnesses in the case, both those of the plaintiff and the defendant, that the railroad track between the rails at the point where the plaintiff was injured was not constructed, intended or used for a walkway, but for the primary and sole purpose of the operation of trains. It also appears conclusively from all the evidence that there was no defect in the track, either on account of the cross-ties or the lack of ballast, that would in any measure interfere with or endanger the operation of trains upon this part of the track. The plaintiff testified:

"This track was not in a dangerous condition for the purpose of operation; this particular part of the track was not in a dangerous condition as to operation, so far as I observed. The tie I saw and the condition of the track there as I observed it was not dangerous to the operation of trains; one tie would not have any effect at all. You could leave out a tie and it would probably not interfere with operation at all. I do not know that one rotten cross-tie would affect the operation of a train, I should not think so. I

cannot recall any special road I have observed as to rotten ties outside of the Southern, but I have observed quite a number of rotten cross-ties on the Southern. I think it is perfectly true that is a universal condition that there are some decayed ties, but not enough to affect the operation in any way of the roads, but this is not so far as my own observation goes, I cannot say. With respect to ballast, I expect there are places over all roads between the ties that are not entirely filled in with the ballast; I don't know this. If the cross-ties on either side are sound, the condition of one cross-tie, whether defective or absent, will not affect dangerously in any way the operation of the road. The failure to fill up entirely with ballast between any two ties will not impair the use or safety of the track in operation" (printed Record, p. 20).

The plaintiff's witness Newton also testified:

"One decayed cross-tie in the track would not injure the operation of the road; it would not be detrimental to the operation of the road if the other ties were sound; if it was not ballasted entirely to the top of the cross-ties that would not necessarily affect the proper operation of the road.

"If it remained for a long time in that condition it would, not for a short period probably. If it was not ballasted in one place between the ties it would not affect the proper operation of the road" (Printed Record, p. 30).

The plaintiff in walking along the track in making his survey was not using the track for the purpose for which it was intended and designed. Mr. Labatt in his work on Master and Servant lays down the general rule in the following language, Vol. 3:

"921. A general principle which is frequently conclusive against the servant's right to maintain an action is that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed."

While it is true that there are decisions by the courts of some of the States in the Union allowing a recovery where brakemen or switchmen, engaged in the actual operation of trains, such as switching cars and the like, have stepped into excavations or vacant places between the ties and were injured, we have been unable to find a case in which a recovery has been allowed by an appellate court under facts similar to those in this case. On the contrary, the Supreme Court of the State of Pennsylvania has held in a case where a *brakeman* was injured while coupling cars by stepping into an open hole or drain eight or ten inches deep between the ties that he could not recover. There was a verdict and judgment for the plaintiff and the defendant appealed. In overruling the court below the Supreme Court of Pennsylvania uses the following language:

"In discussing the assignments of error, the first question that presents itself is, what duty did defendant owe plaintiff, as concerning the ballasting of its tracks? For we must assume as facts that the track between two ties at that point was not ballasted like unto the other parts of it, and that plaintiff's injury was caused thereby. The jury, under the instructions given, must have so found, and that is an end of the matter.

"This is a case of master and servant. It was the duty of the master to furnish a reasonably safe place for the servant to work, in view of the duties imposed upon him. What is the test of 'reasonably safe' when applied to the roadbed of a steam railroad? There was a point between two ties where there was no ballast, because it had been washed out. If an injury had been caused a passenger in consequence of this, he would undoubtedly have had a cause of action, for it was the company's duty to maintain, as to him, a safe roadbed. But this was not a footway for foot travelers or employees. If the roadbed had been such a way, then ordinary care would have required planking on all the ties, for only by that method would the feet and ankles be free from sprains, and the person from injury.

Ballast is usually composed of loose material, such as broken stones or cinders, on which rest the ties, sometimes spaced or filled between with the same material, but always with more or less inequality of surface. Sometimes there is a small constructed open-box drain between the ties. Except at crossings the ties are not planked; nor, so far as concerns their purpose, is there any reason why they should be. No custom of common carriers is shown from which a reasonable inference of negligence could be drawn from its not ballasting full between the ties. The proof is the other way. If there was owing to plaintiff the very highest degree of care, the same as to the contract passenger, then the jury might have been at liberty to infer negligence, because they might have said that between every two ties on its miles of road the company was bound to maintain an even or planked surface. But it owed no such duty to its employee who, at rare intervals, must step or stand on the roadbed. Any such degree of care would warrant the jury in finding the company was bound to maintain guard rails on embankments, and planking on all bridges, although not a single passenger on a train would be imperiled from the absence of either."

Kerrigan vs. Pennsylvania R. R., 194 Pa., 98;
44 Atl., 1069.

It will be noted that in *Kerrigan's* case the plaintiff was a brakeman actually engaged in the operation of a train, coupling cars, with no opportunity or time to look where he was placing his feet. Here, Nelson was deliberately walking along the track in the daytime, with nothing to distract his attention, except to jot down in his notebook the number of each station one hundred feet apart. He testifies that he had "just passed station number twenty-one" and, therefore, had nothing whatever to do except to use his eyes to see where he was placing his feet. If he is entitled to recover, then, as is said by the Supreme Court of Pennsylvania in *Kerrigan's* case, the railroad company must "put down a plank walkway all along its track and

protect all of its embankments by guard rails," and even then it can not escape liability where its employees stumble and fall upon its tracks.

In the case of *International and Great Northern Railroad Company vs. Rieden* (Tex.), 107 S. W. Rep., 661-665, the plaintiff was a brakeman on a freight train in the defendant's employ, and it became his duty to go upon the main track of defendant's road at Tuna siding to flag an approaching passenger train. While on the siding he stepped upon the end of a crosstie which, by reason of its rotten condition, crumbled beneath him, threw him down and his head struck one of the rails, rendering him unconscious, and when in such condition the passenger train struck him in the face and injured him. Among the grounds of negligence alleged was that the defendant was negligent in permitting the defective and rotten crosstie to be and remain in the track.

The Court of Civil Appeals of the State of Texas in its opinion reversing a judgment for the plaintiff uses the following language:

"The work of coupling and uncoupling cars, especially from the manner it was done before they were equipped with automatic couplers, requires the roadbed to be free from such defects or obstructions as might reasonably be supposed to unnecessarily increase the danger. Hence, duty of the company to use ordinary care to keep that part of it designed for such work free from such defect and obstruction. But in flagging or signaling a train the same danger is not encountered by the flagman that is by the brakeman in making a coupling, or, at least, one could not be expected to anticipate such danger, nor to exercise the same degree of care to keep the roadbed free from holes, slivers protruding or rotten crossties, ditches, etc., as he would a place where switching is to be done. Any portion of a railroad track which is reasonably safe to operate engines and cars upon is ordinarily reasonably safe for a man to go upon for the purpose of flagging a train, or to

step off of when he has performed such services. Accidents may arise in the operation of trains that may require a servant of a railroad company to go upon its track at any point along the line of road and signal an approaching train to stop in order that the danger arising from such accident may be averted. But when, where, or how such accident will occur, which will require such a signal to be given, can not reasonably be foreseen. And, therefore, ordinary diligence does not require the company to have its roadbed or material used in its construction in such condition, at the point where the signaling is to be done, as will free it from such defects as might in some way cause injury to the flagman in going on or off the track at that point."

The case of *East Tennessee, Virginia & Georgia Railroad Company vs. Reynolds*, decided by the Supreme Court of Georgia, and reported in 20 S. E. Rep., 70, has been cited frequently by other courts in analogous cases, and is cited in the footnote on page 2462, section 921, of *Labatt on Master and Servant* in the second and last edition, which was published in 1913. Although this decision was rendered in 1894, we cannot find a decision of any court which, under similar facts, has held to the contrary. The facts in this case are so similar to the facts in the case at bar that, as is said in the opinion of Justice Brown, it is "on all fours" with this. The plaintiff was a conductor of a train which had stopped for some reason unknown to him. He started forward to ascertain from the engineer the cause of the stop, at the same time sending a flagman back on the track with a red light for the purpose of warning a train which was following in his rear. Before he reached the engine the engineer started his train, when, by the breaking of a link, it came apart and the rear portion rolled down the track passing the flagman. The conductor applied the brakes and stopped the detached portion of the train, and then undertook to go back on the track himself for the purpose of warning the approaching train in time to avoid a collision.

"In going back to signal the train the conductor started across a trestle in great haste and when about half way across he stepped on a cross-tie on the top of which was a small bit of decayed sap which slipped off or came loose from the tie causing him to fall and to become seriously injured."

The court in reversing a judgment for the plaintiff held that there was no negligence on the part of the defendant, and in its opinion uses this language:

"Relatively to the plaintiff we do not think this was negligence. It did not appear that this crosstie was not otherwise sound and in all respects sufficient and suitable for the use for which it was intended. It certainly was not the purpose of the company in having ties to make a way for employees to walk upon but to make a safe roadbed for the running of its trains. The simple truth is that the injury to the plaintiff was a mere casualty incident to the business in which he was engaged, and the ordinary risks of which he assumed in accepting his employment. This seems to be too plain for argument. Accidents will happen, not only in the best regulated families, but upon the best regulated railroads as well, and to allow the recovery to stand in the present case would be holding the company liable for the consequence of a mere accident for which it is in no fair view responsible."

In the case of *Finnell vs. Delaware, &c., Co. (N. Y.)*, 29 N. E. Rep., 825, the Court of Appeals of New York in reversing a judgment for the plaintiff, a brakeman, who was injured by catching his foot between two ties at a point where the ballast was lacking, used the following language:

"He claims that the defendant was negligent in not ballasting this branch track so as to make it safe for him to walk thereon and to discharge his duty as brakeman while standing thereon. But we do not understand that railroad tracks are ballasted for the purpose of making them safe for brakemen to walk upon, but, for the purpose of making them

firm and safe for the passage of trains, and we do not think the defendant neglected any duty it owed the plaintiff in not ballasting the track at the place where the accident occurred. It is not claimed that there was any trap in the track, or that the track was in any respect defective or dangerous, except in that it was not ballasted."

4. Plaintiff Assumed the Risk.

Plaintiff's attorneys in their brief, at page 9, briefly discussed the doctrine of assumed risk, although at page 3 they state that the sole question presented is whether or not there was negligence. In view of this we will call the attention of this court in a brief way to the facts and authorities that bear upon this question.

The plaintiff started in the service of the railway company as a rodman and occupied that position for eighteen months, and was then put in charge of a new yard to be built at Greenville, South Carolina. He stayed there and superintended the construction of the yard until there was a vacancy created among the engineers in the office at Greensboro, and was then promoted to the position of assistant engineer. That was two or two and a half years after he had first taken service with the railway company. After that time he had about nine years' experience altogether as a railroad engineer at the time he was injured (Printed Record, p. 18).

The plaintiff testified as follows:

"As a part of that experience I had to supervise the construction work; to a great extent I was thoroughly familiar with all the work of an engineer and all the method and manner of laying tracks and side-tracks. In that work I very often had to lay out tracks over very rough territory; I had to lay out work over territory that was in rocks and gulleys and hills and over the streams and even through mountains. As a part and parcel of my work as

an engineer I had to be particular as to where I was going and where I stepped in the construction work."

Plaintiff's witness Newton testified:

"The duties of an engineer take him out to do all classes of construction work, to make surveys for it. He not only had to work where the track was level and where the ground was level, but in all sorts of rough places, and he had to work where the track was rough and uneven as well as where it was smooth; he had to work where the track was ballasted and where it was not ballasted; he had to work where they were taking out defective ties and putting in ties, and where they were not. He had to work where they were defective as well as where they were not defective. In doing that work he necessarily had to look out where he was stepping for his own safety; he had to take the proper precaution, of course" (Printed Record, p. 30).

Plaintiff's witness Higgins also said:

"In doing our work we had to go over all classes of places; we had to go over rough country as well as smooth; we had to go over rough track as well as smooth; I don't remember being out with him where they were constructing new track; we had to go over places where there was no ballast as well as places where there was; we had to go over all sorts of uneven territory in making our surveys; we had to go over places where the crossties were worn as well as those where they were not; we had to go over places where crossties were defective from decay as well as where they were not; an engineer in his work was not required to have a smooth pathway in doing that work; we did not expect anything of that kind; we had to be constantly on our guard as to where we were going; we had to watch, yes. I am not working for the railroad company now." (Printed Record, page 32.)

While the plaintiff was at the time of the accident walking between the rails upon the track, it appears from the testimony of his own witness Newton, an experienced engineer, that he might have used the walk-way on either side of the track, and could have checked his stations from there without going on the track between the rails. The witness says:

"The checking, of course, has to be done from the same side the stations are marked on the rail; sometimes they are marked on the outside, more generally marked on the inside; we do it either way, according to the convenience of the particular instance. If it is marked on the inside it could not be read from the outside unless you have a machine that can look through a steel rail. If you are walking on the outside of the track and the mark is on the inside of the opposite rail there is nothing to prevent you from seeing that; no, in that case there is nothing to prevent, provided your mark is of sufficient distinctness to be seen that distance. Marking with that sort of chalk the mark is sufficiently distinct as a general proposition." (Printed Record, p. 31.)

It also appears from the testimony of this same witness for the plaintiff that there is a walk-way on both sides of this track (Printed Record, p. 31).

"There was a walk-way on both sides of that track, so far as my recollection goes."

There is no dispute about this, but attention is directed to the statements of a number of witnesses, not only that there was a walk-way on both sides of the track, but that these walk-ways were safe and in good condition.

D. S. Gaulding, defendant's witness, testified:

"With respect to this place where I was shown this tie by Roberts it is about 100 feet from the depot platform; it is not a part of the place where passengers alight from the trains; on either side of the main line has a good walk-way; good walk-way on the right-hand side and has been a good walk-way on the left side until the additional tracks were put on the left" (Printed Record, page 39).

G. Wade, witness for defendant, testified:

"On either side of the track in June, 1914, was a walk-way, was a good path on either side; on the right-hand side it was a good walk, and a tolerably good path on the left side" (Printed Record, page 41).

H. D. Peters testified that he used this track almost daily between his home and place of business and that "in June, 1914, there was on either side of the track a walk-way, just a cinder walk-way. It was perfectly smooth, as you would speak of ground being smooth" (Printed Record, p. 43).

W. R. Staples testified that he used the track every few days in connection with his fertilizer business, and that:

"With respect to the walk-way, the one between the main-line track and the first side-track I should judge about 3 feet between the ends of the ties, two and one-half or three feet. That has always been as smooth as you could expect good cinders to get; the other side is not quite so broad, but it was a good walk-way. It was in that fix in June, 1914. I have never seen any changes since I have been there" (Printed Record, p. 44).

J. H. Daniel used the track almost daily, and testified that the walk-way on either side of the track was good (printed Record, p. 48).

Summarizing, we have here a case of a thoroughly experienced engineer in track construction and track repair (Printed Record, p. 18), who had walked over this same track two or three times before on the same day that he was injured (Printed Record, p. 18), and who admitted in his testimony that he knew that there were occasional decaying ties in the tracks of the defendant (Printed Record, p. 20).

It is respectfully submitted that under the facts of this case the plaintiff's work was not directly connected with the track on which his accident occurred. His first work was to locate certain stations which, when located, were indicated by chalk marks on the rails of the main line. These stations

were marked with chalk and could readily be seen at a considerable distance. Certainly it was unnecessary to walk between the rails in order to see the marks, as the plaintiff's own witness testified that these marks could be seen from the walk-way along the side of the track (Printed Record, p. 31).

Plaintiff then was charged with notice of what condition he might find the track to be in if he walked upon it, and voluntarily assumed the risk from the necessarily somewhat uneven walk-way upon the ties and ballast between the tracks when he could easily have used either one of two perfectly safe smooth walk-ways along the side of the track. It is earnestly contended that if the defendant was guilty of any negligence whatever in not having this one tie absolutely sound at all times (although the contrary is contended), that the plaintiff, under his own statement and those of his witnesses, voluntarily assumed the risk of any danger that might exist by departing from the safe way and choosing the unsafe one. The place of the accident was a part of the permanent conditions of the railroad. Being in the open air and the accident having occurred in broad daylight, the track at this point, the cross-ties and the ballast were in all respects visible.

"An employee assumes, as an incident of his service, any risks which arise from the permanent, visible conditions of his master's plant. In the last analysis this doctrine is obviously referable either to the principle that a master has a right to carry on his business in his own way, or to the principle that it is not negligence to require a servant to encounter perils which he fully understands."

Labatt on Master and Servant (2d ed.), sec. 1172.

"When an employee, knowing of a particular mode laid out by the master for doing his work and of the appliances furnished therefor, enters the service and continues in the service of his employer he assumes the ordinary risks of such service arising from such mode which he knows by ordinary observation

and from such appliances which are simple in their construction, not worn out, broken or defective."

Lading vs. Jefferson Ice Co., 141 Wis., 191;
124 N. W. Rep., 407.

The plaintiff having testified that the track was safe for the operation of trains, and that the defect complained of was one which he would not consider it his duty to report, and he being an employee not engaged in the operation of a train, the master had discharged its legal duty to him.

"The risks which an employment still involves after a master has done everything which the law requires him to do for the purpose of securing the safety of his servants are presumed to be accepted by each and all of those servants, unless by reason of their immature age or their inexperience they are incapable of appreciating the hazards to which they are exposed."

Labatt on Master and Servant (2d ed.), sec. 1169.

It would, of course, be impossible for any railroad company to have an absolutely perfect track containing nothing but perfect cross-ties and all spaces perfectly ballasted between them. Time and weather begin to work upon the wooden ties and material used for ballast immediately after they are placed in the track. These are all well known to every employee of the railroad company and were well known to the plaintiff at the time he entered the service, and during his eleven years' experience, and at the time of the accident. That a cross-tie will decay by exposure to weather and time was well known to him, as is shown from his evidence quoted above, and also that the rain will wash the ballast out from between the ties.

In the case of *Seaboard Air Line Railway Company vs. Horton*, 233 U. S., 492, the Supreme Court of the United States has said:

"Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not."

The case of *Chicago & Northwestern R. R. Co. vs. Bower*, 241 U. S., 470, cited by the plaintiff in error, was where the plaintiff was injured by the explosion of lubricator glasses, which was an appliance furnished by the defendant for the plaintiff's use, and which he had a right to assume was not in a defective condition. It was not a part of the permanent structures of the defendant as was the roadway in this case.

In the case of *C. & O. Railway Co. vs. De Atley*, 241 U. S., 310, the plaintiff, a brakeman, was injured while boarding a moving train. This court held:

"That the plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train he assumed the risk of the injury normally incident to that operation other than such as might arise from the failure of the locomotive engineer to operate the train with due care and to maintain a moderate rate of speed in order to enable the plaintiff to board it without undue peril to himself."

In other words, if the plaintiff had been injured while boarding the train at a normal rate of speed he could not have recovered, because that would have been an ordinary risk assumed by him just as Nelson assumed the ordinary risk of being injured by stepping upon a cross-tie which was partially decayed or into a space between the tracks that was not perfectly ballasted, being a mere incident of his occupation.

In the case of *Central Vermont R. R. Co. vs. White*, 238 U. S., 307, it is held that:

"A railway employee does not assume the risk arising from unknown defects in engines, machinery, or appliances."

The plaintiff's intestate in that case was killed in a collision caused by a leaking cylinder. He was a brakeman on the train, and therefore had no knowledge of the defect. This is an entirely different case from the case at bar, in which Nelson knew that the railroad company had ties in its track that were not perfect and that there were places in the track that were not perfectly ballasted, and where he had every opportunity to see and examine the track just previous to and at the time he was injured.

In the case of *Gila Valley, &c., Ry. Co. vs. Hall*, 232 U. S., 94, the plaintiff, riding upon a gasoline car, was injured in a derailment of the car caused by the breaking of a flange on one of the wheels. It was held that he did not assume this risk unless he had known of the defect in the flange. This case is also different from Nelson's case, as this was not a part of the permanent structure, but was an appliance furnished for temporary use and which the plaintiff had had no opportunity to observe or examine in any way, and which was presumed to be without defect.

In the case of *Jacobs vs. Southern Railway Company*, 241 U. S., 229, where a brakeman was injured by stumbling over a pile of cinders near the track as he attempted to board a moving train. It was contended that in order to charge the plaintiff with assumed risk the evidence must show that he both knew and appreciated the dangers. This court in holding that the defense of assumed risk was applicable said:

"He admitted a knowledge of the 'material conditions,' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine

with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them. We think his situation brought him within the rule of the cases. *Gila Valley Ry. vs. Hall*, 232 U. S., 94, 102."

Reference is made also to the case of *Baugham, Adm'r, vs. New York, etc., R. Co.*, 241 U. S., 237.

We contend that in this case the injury sustained by the plaintiff was an ordinary risk assumed by him in entering and remaining in the employment of defendant in his occupation as civil engineer, and that especially was it assumed by him when he left a safe walk-way and went upon the tracks between the rails where the surfaces are necessarily not so smooth, to do his work, which could have as well been done from the safe position.

Plaintiff in error concedes in his brief, at page 10, that "the defect in the cross-tie was a latent one," and at page 2, that "an oak tie rots from the inside."

It is difficult to imagine a situation which would present a case of ordinary risk more clearly than the case at bar. The plaintiff was engaged about his ordinary duties under normal conditions, upon a track with which he was familiar, which was a part of the permanent plant or railroad of his master, doing his work in his own way, without interference or directions from any superior officer, and while walking along the track in the daylight slipped on a cross-tie, which, although partially decayed, was not in such condition as to render the roadway unsafe or unsuitable, slipped into an open space between the ties which was not entirely filled with ballast, stumbled and fell. It seems, therefore, that this case comes clearly within the doctrine of the assumption of ordinary risks.

5. The Defendant Could Not Have Reasonably Foreseen the Accident.

Under the law of master and servant it is essential, in order to establish negligence on the part of the master, that he could have reasonably, or by the exercise of ordinary care, foreseen that such an accident as the servant has sustained, might occur. If the condition of the track had been such at that point, on account of the unsoundness of many ties or from the entire lack of ballast, that it was unsafe for the operation of trains, and a train had been actually derailed at that point on account of such defective construction and an injury resulted, it could be said that the defendant might have reasonably foreseen such an occurrence; but it would be requiring the master to go beyond the realms of probability into speculation and possibilities to hold that he could foresee that a civil engineer, engaged in a survey upon its main-line track in the daytime, would sustain such an injury under the circumstances disclosed by the evidence in this case. It would require the defendant, and all other railroad companies, to have an absolutely perfect walk-way along the thousands of miles of their tracks upon which it would be impossible for such an employee as the plaintiff to stumble and fall. As is said by Justice Walker in the opinion of the Supreme Court of North Carolina in this case:

“To require of a railroad company to discover every little ‘doty place’ in every one of its thousands of cross-ties in order that its employees of every class may walk with absolute safety on them would demand of it a degree of care and diligence almost beyond human endeavor” (Printed Record, p. 67).

6. The Case Does Not Involve an Interpretation of the Federal Act or Definition of Legal Principle in its Application.

It appears from the whole record in this case that there is no question as to the applicability of the Federal Employers' Liability Act. It was set up in the complaint and admitted in the answer that the defendant was engaged in interstate commerce and that the plaintiff at the time of his injury was employed in interstate commerce. It was tried under the Federal Employers' Liability Act in the State court and no question in regard to the application of the act or definition of its provisions was raised in the appeal to the Supreme Court. The sole question presented in this writ of error is, whether there was sufficient evidence of negligence to warrant the trial court in submitting the case to the jury. The issues to be decided in this case are ones of fact, not ones of law. This court has repeatedly held that in such cases it will not disturb the decision of the Supreme Court of a State unless there is palpable error.

Great Northern R. R. Co. *vs.* Knapp, 240 U. S., 464; 60 L. E., 745, 751.

Seaboard Air Line R. Co. *vs.* Pagett, 236 U. S., 668, 673; 59 L. E., 777, 781.

Seaboard Air Line R. Co. *vs.* Koennecke, 239 U. S., 352, 355.

In the Knapp case, *supra*, Mr. Justice Hughes, in delivering the opinion of the court, said:

"The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The State courts, trial and appellate, held that there were. Having regard to the appropriate exercise of

the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion."

7. Discussion of Authorities Cited in Brief of Plaintiff in Error.

The case of *Seaboard Air Line Ry. Co. vs. Renn*, 241 U. S., 290, is cited by the plaintiff in error as a case in which the plaintiff was allowed to recover by the Supreme Court of North Carolina under the Federal Employers' Liability Act, and upon appeal the judgment affirmed by the Supreme Court of the United States, and is said by the plaintiff in error to bear a striking similarity to the facts in this case. Upon examination of *Renn's* case, however, it appears (170 N. C., p. 139) that the plaintiff was not injured upon the premises in their permanent and ordinary condition, as was Nelson in this case; but was injured by falling upon ice which was caused by the freezing of water which had overflowed from a tank which the defendant had negligently allowed to continue working after the tank was full. There the plaintiff did not step upon the ice in the daytime, as did Nelson upon the crosstie, but was walking along the path in the nighttime by the aid of a lantern. It also appears that the ice was covered with snow, so that plaintiff could not detect its presence and that the plaintiff was unfamiliar with the premises or the location of the tank. Instead of there being a similarity between this case and the case of *Renn vs. Railroad*, it will be seen that there is a marked difference between the cases in almost every particular.

Southern Railway Company vs. Puckett, 244 U. S., 571, is also referred to in plaintiff's brief as being a case similar to this. It appears from an examination of that case that the plaintiff was not injured upon the permanent track, crossties or ballast, as was Nelson in this case, but "stum-

bled over certain large clinkers which were on the roadway near the track, and in stumbling struck his foot against some old crossties overgrown with grass." These clinkers and old crossties were not a necessary part of the railroad, not a part of its permanent structure, and the crossties being overgrown with grass were evidently concealed from the view of the plaintiff. The facts, therefore, are not at all similar to those in this case. We also find that this court did not pass upon the question of negligence in this case, but expressly stated that "this is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two State courts."

Great Northern Rwy. Co. *vs.* Knapp, *supra*.

It is deemed unnecessary to discuss in detail each of the remaining cases cited by the plaintiff in error in his brief, as each one is easily distinguishable from the case at bar, and not an authority to sustain plaintiff's proposition. It is sufficient to say that as a class they relate to transportation employees constantly at work on the ways and appliances involved, and contain positive evidence of negligence, which would carry the cases to the jury.

8. Summary.

In conclusion we respectfully submit that an examination of the record will show:

First, that the defendant did not owe to the plaintiff the duty to have a safe walk-way along the middle of its track upon which to walk in making his survey.

Second, that the accident was the result of an ordinary risk which the plaintiff assumed in entering and remaining in the service of the defendant.

Third, that this was such an accident as the defendant could not reasonably foresee or guard against.

Fourth, there is no palpable error on account of which this court should reverse the Supreme Court of North Carolina upon the question of negligence, dependent upon facts alone, no interpretation or definition of the Federal Act being involved.

We respectfully urge that upon consideration of the whole case the judgment of the Supreme Court of North Carolina should be sustained.

Respectfully submitted,

H. O'B. COOPER,
GARLAND S. FERGUSON, JR.,
Attorneys for Defendant in Error.

L. E. JEFFRIES,
CLEMENT MANLY,
JOHN N. WILSON,
Of Counsel.

(35786)